THE CONVEYANCER AND PROPERTY LAWYER

VOL. 23, NO. 5 SEPTEMBER—OCTOBER, 1959

CONVEYANCER'S NOTEBOOK

REPORT ON H.M. LAND REGISTRY FOR 1958–1959

It is probably true to say that any solicitor admitted this year, in whatever part of the country he may practise, is likely to be doing more registered than unregistered conveyancing by the time he comes to retire, for not only are the compulsory areas steadily increasing but so also are the voluntary registrations. The number of first registrations in non-compulsory areas was 5,105 in 1958 against 4,223 in 1957. Modesty no doubt prevented the Chief Land Registrar from recording in his annual report (*a*) the most important event in relation to registered land, the publication of *Curtis & Ruoff*. Two other matters are particularly worthy of notice, the introduction of the "Title shown" procedure, which is fully described in an article in this issue (*b*), and of a new procedure for dealing with registered building estates.

Registered building estates

The latter procedure is described in the report as follows: "Briefly the procedure is that before sales begin the estate developers' solicitors send two copies of the estate layout plan to the Registry showing the plot or other reference numbers and clearly defining the extent of the individual plots. When approved one copy of the layout plan is returned marked accordingly and the other is retained in the Registry. Then an intending purchaser by quoting the number of the plot in which he is interested may obtain from the Registry a certificate to the effect that the plot is

(*a*) H.M. Stationery Office, price 2s.
(*b*) *Post*, p. 326.

or is not in the vendor's title and is or is not (as the case may be) affected by any markings on the filed plan of the vendor's title. With such a certificate a purchaser who holds a copy of or extract from the approved estate layout plan does not require a copy of the vendor's filed plan because he is given all the information which he could obtain by an inspection of that plan and moreover is guaranteed that the plot actually is in the vendor's title. The charge for a certificate is 1s. 0d."

The report points out that this machinery saves vendors the time and expense of obtaining office copies of the filed plans of their titles to hand over to purchasers of plots and prevents delay in the registration of transfers and the issue of certificates of official searches caused by constant withdrawals of filed plans for copying. Furthermore, it obviates the necessity for a separate plan to accompany the application for an official search.

Miscellaneous points

London and Middlesex of all places caused additional work by the increase in applications for first registration by about 44 per cent. over 1957. The Chief Land Registrar suggests that this is probably due to the effect of the Rent Act and that the House Purchase and Housing Act may well have a similar effect. It is hardly for us to say whether the increase in the number of owner-occupied houses is to the advantage of the community, as that is a matter on which political opinions differ.

"It is impossible," says the Report, "to recruit typists in London."

There has been a steep increase in the number of registrations of new leases, mainly of flats or maisonettes. The report does not tell us, but we believe we are right in saying, that more leaseholders are applying for absolute titles, instead of good leasehold, than formerly; nor does it tell us that the filed plans in such cases are often unsatisfactory, showing the plan of the whole block of flats or maisonettes and adding a note to the effect that the flat or maisonette is to be found there somewhere.

Official searches of index maps (which are free) showed a substantial increase. We were buying some unregistered freehold land during the year and a search showed that two leases of parts of the land were registered, the existence of the leases having been forgotten or overlooked by the vendor. Such a state of affairs can easily arise as a result of disclaimer of a registered lease after war damage. A search is the only way of ascertaining the position for certain.

Revenue was appreciably in excess of expenditure, which should avoid any increase of fees for some time.

Landlord and Tenant (Furniture and Fittings) Act, 1959

This Act, which received the Royal Assent on July 29 and came into force on August 29, seeks to protect prospective tenants against having to pay excessive prices for furniture and fittings. The Act only applies to premises which are within the Rent Acts, and, for the period of three years from July 6, 1957, to premises within section 13 of the Rent Act, 1957, *i.e.*, premises decontrolled by section 11 (1) and (2) and premises outside the Acts only by reason of the fact that the rent is less than two-thirds of the rateable value. The Act provides that it is an offence for any person, in connection with the proposed grant, continuance or assignment of a tenancy of such premises, where the purchase of furniture or fittings is one of the terms, either to offer the furniture or fittings at a price which he knows or ought to know is unreasonably high or to fail to furnish a written inventory priced item by item to the prospective tenant. The obligations are wide and vague: "any person" presumably includes estate agent, solicitor and landlord. The obligations are owed to any person seeking to obtain or retain accommodation to whom particulars of the tenancy are supplied. If the agent gives particulars in the first place and the landlord's solicitor then sends a draft tenancy agreement, it would appear that the priced inventory must be supplied twice. It does not matter whether the furniture is offered openly at too high a price or the price is sought to be obtained in some other way. It would not appear that an offence is committed if the price for any one item is too high if the total sum is not.

The local authority, after notice to the person entitled to possession of the premises or his agent, may inspect the premises and, if facilities for inspection are not given, may apply to a justice of the peace for a warrant to enter the premises, if necessary by force.

Rights of Light Act, 1959

As a result of war damage, owners of land on which former buildings have been destroyed or demolished, ran the risk of adjoining occupiers acquiring rights of light over the land and making it impracticable to replace the former buildings. The Rights of Light Act, 1959, which received the Royal Assent on July 16, came into force immediately so far as concerns section 1, which extends the period of prescription, and, as to the rest of the Act, came into force on October 16. Section 1 provides quite

generally that the 20-year period of prescription applicable to rights of light under the Prescription Act, 1832, s. 3, shall be increased to twenty-seven years in relation to certain specified proceedings. The proceedings specified are those commenced after July 14, 1958, unless terminated on or before July 16, 1959, and those commenced after July 16, 1959, and before the end of 1962. It is to be noted that the Act is not confined to war-damaged premises or undeveloped land. Any person who has in the ordinary way acquired a right of light by twenty to twenty-seven years' user has been deprived of that right even though the adjoining owner merely wishes to extend his building and has been in no way affected by the war. Although in 1963 the period will revert to twenty years, acts done before then which would otherwise constitute an infringement are not prejudiced.

Section 2 enables owners of potentially servient tenements to register notice with the local authority, who must register the notice in the register of local land charges. In other words, notice under the section is an alternative to actual obstruction of the flow of light. Unfortunately, the procedure is far from simple. First, application has to be made to the Lands Tribunal either for a certificate that adequate notice has been given to all persons who appear likely to be affected by the notice or for a certificate of exceptional urgency. A certificate of exceptional urgency has to be followed by a normal certificate in due course; otherwise the registration will lapse (s. 3 (a) (c)). Then the notice must not only identify the dominant and servient tenements but also specify the position and dimensions of the notional "opaque structure." A notice only remains in force for one year (unless cancelled earlier) (s. 3 (2)). It will be appreciated that, though registration only lasts for one year, it is sufficient to break the period of prescription so that time will begin to run entirely anew from the expiration of the registration. It should also be noted that section 2, unlike section 1, is permanent in operation.

Registration does not determine whether there is or is not a right of light. It constitutes a notional obstruction and if in fact the owner of a dominant tenement has acquired an easement he may sue in respect of the interference with the flow of light notionally caused by the obstruction (s. 3 (3)). Proceedings cannot be taken under the subsection after the notice has ceased to be in force. Section 3 (4) adds a further complication to the question, what constitutes an interruption. Interruption to be effective must last a year, so that when an easement had been enjoyed for nineteen years and 330 days, followed by an interruption of thirty-five days, the dominant owner succeeded in his claim

to an easement (*c*). But until the twenty years has expired the servient owner may successfully challenge the alleged easement by asking the court for a declaration, for the action is not merely an interruption but marks the end of the statutory period (*d*). Section 3 (4) provides that when a notice is registered during the twentieth year, the dominant owner during the period of registration shall be entitled to sue in respect of a notional obstruction under section 3 (3). What happens if the dominant owner sues relying on section 3 (4) and the servient owner counterclaims for a declaration relying on *Reilly* v. *Orange* (*d*)?

Legitimacy Act, 1959

The Legitimacy Act, 1959, received the Royal Assent on July 29 and came into force on October 29. There are two principal alterations in the law. First, a child now becomes legitimated by the subsequent marriage of its parents notwithstanding that at the time of its birth one of its parents was married to a third person (s. 1). Secondly, the doctrine of the putative marriage is now introduced into English law so far as children of the union are concerned. Where a father of a child is domiciled in England at the date of the birth or, if he predeceased the birth, was domiciled in England at the date of his death, the child is treated as legitimate notwithstanding that it is issue of a void marriage if, at the time of conception or at the date of the ceremony of marriage (if subsequent to conception), either parent believed the marriage was valid (s. 2).

(*c*) *Flight* v. *Thomas* (1841) 8 C. & Fin. 231.
(*d*) *Reilly* v. *Orange* [1955] 1 W.L.R. 616.

ON MAKING THE MOST OF LAND REGISTRATION

II. The "Title Shown" Procedure

By Theodore B. F. Ruoff, Solicitor

The New Techniques

In his Report to the Lord Chancellor on the work of H.M. Land Registry for 1958–59, the Chief Land Registrar described two new techniques which have been devised in order to facilitate the dispatch of business (*a*). Both of them are intended to assist in the sales of individual plots or houses on large estates. One relates to the sale of houses on fully developed unregistered estates; the other to the sale of plots on building estates of which the title is registered already. A partial account of the latter has already been given to readers of this journal (*b*), but the former, which is largely unknown, saves the practitioner so much time, tedium and hard cash that it is thought that some details of the procedure which the inevitably abbreviated account in the Report does not give will be welcomed.

First, however, one point should be made clear. The new technique is entirely independent of any provision in the Land Registration Acts and Rules. Consequently no one can claim to use it as of right. Nevertheless it should be remembered that the Registry has invented the technique for the benefit of the legal profession so that if, in their overall view of the picture, the Registry's officials state that the procedure cannot appropriately be applied to a particular estate, that statement should not be regarded as being made either lightly or bureaucratically.

Nature of Title Shown Procedure

The procedure relating to unregistered land, known as the "Title Shown" procedure, must still be regarded as being, to some extent, in an experimental state although, already, some 19,000 houses have been successfully sold and registered under it. In a nutshell, this is what happens. Before any houses are offered for sale the Registry, by invitation, makes an exhaustive examination

(*a*) Report to the Lord Chancellor on H.M. Land Registry for the Financial Year 1958–1959 (H.M. Stationery Office, 2s.), pp. 5 and 6.
(*b*) 23 *The Conveyancer* (N.S.), pp. 111–113.

of the topography and the title and then, if the facts so warrant, issues a letter to the vendor's solicitors stating the terms upon which an absolute title will be granted to purchasers of individual houses. It is readily apparent that if the vendor's solicitors are able to obtain such a letter, they may issue duplicated copies of it to each proposing purchaser, so that, on the one hand, they themselves avoid making a normal deduction of title some hundreds or thousands of times whilst, on the other hand, every purchaser's solicitor is saved the trouble and expense of making a normal investigation of title. These singular advantages cost the vendor no more than a single deduction of title and a few attendances at the Registry.

Circumstances to which Applicable

Before the reader is given a detailed description of the Title Shown procedure it is as well to clear the ground by stating, as categorically as possible, the circumstances in which it can, and those to which it cannot, be applied. They are as follows:

(1) The procedure may be used for land within the compulsory areas. It cannot ever be used for land outside them, if only for the reason that as no purchaser would be under an obligation to register his title, all the work of the vendor's solicitors in collaboration with the Registry might well be rendered a time-wasting fiasco by his deciding not to register. Moreover, although it might be argued that the obtaining of a letter as to the title, whether or not it is used, is the equivalent of taking an opinion on title, such is far from being the case because, for example, the Chief Land Registrar has wide powers of ignoring the technical defects in a title (*c*) which, if mention of them were omitted from an opinion, would largely detract from its value.

(2) The procedure may be used when the vendor's title to the entire estate is derived from a single conveyance or assurance in his favour, including the case of a corporation deriving title under a statute or a scheme, or similar instrument. It cannot, as at present devised, normally be applied to a complex title under which many different parts of the estate have come to the vendor by separate titles. That is not to say, however, that the Registry will not consider applying it to a case in which the main title is a common one although small areas of land at the fringe have later been acquired by exchange or purchase. The fact that the title is known to contain minor defects need not deter a vendor from

(*c*) *Cf.* Land Registration Act, 1925, s. 13, proviso (c).

seeking to use the procedure. The defects must, of course, be frankly disclosed.

(3) The procedure was devised for dealing with large estates on which speedy sales are expected to materialise where, in consequence, real economy of effort can be achieved. Although "large" cannot be precisely defined, it is doubtful whether the Registry would agree to apply the procedure to fewer than fifty houses in one locality. Again, the procedure is intended for the case where the entire estate is to be disposed of immediately, and is not suitable for sporadic sales at some future date, by which time the title may have so changed as to invalidate the Registry's letter. The value of the property, however great, is not material to the use of the procedure.

(4) The procedure is ideally suited to the case where a vendor makes an offer to sell the freehold reversion to all existing lessees or underlessees on an estate.

(5) The topography of the property is a factor which determines, in no small degree, the extent to which the Registry can offer assistance. At best the property will consist of a regularly developed compact area of dwelling-houses in a symmetrical pattern. If, however, there is more than one area, or some of the houses have been sold, or the curtilage of some holdings is of irregular shape, or the estate is crossed by railways or canals, these facts create difficulties but they are by no means insoluble. Generally speaking the procedure is not at all suitable for undeveloped land, although it can be used for an unusually large rural area in which a great many farms, houses, cottages, and other units are being sold separately in lots.

(6) Finally, as the Chief Land Registrar observes in his Report: "Most important of all is the assistance which the estate owner's solicitors are prepared to give to the Registry in investigating the title. Unless this is forthcoming in the fullest degree the procedure outlined above is not likely to have a successful outcome." Normally it is essential for the vendor's solicitors to attend at least twice at the Registry in Lincoln's Inn Fields, usually assisted, upon at least one occasion, by the estate surveyor or manager. Furthermore, the Registry will often call for additional evidence which a vendor might not be willing to give to all purchasers; but although the Registry's initial requirements may seem a little stringent, the ultimate reward of an undertaking to grant an absolute title upon the occasion of numerous sales makes the additional trouble well worth while. Unfortunately the need for attendances in London precludes some provincial firms from availing themselves of the procedure.

Preliminary Inquiry and Interview

It is difficult to describe every phase of the procedure in varying conditions, but the following is a typical account of what happens. First, the vendor's solicitors write to the Registry to inquire whether they may avail themselves of the Title Shown procedure. Suppose, for example, that they state that they act for freehold reversioners who own 500 dwelling-houses in one area let on leases for ninety-nine years, and that they are proposing to send out to the present lessees letters offering to sell the reversion. (It is important, incidentally, that the approach to the Registry should be made before negotiations have begun.) The title, they state, is well known to them and is reasonably straightforward. And they describe the locality, usually naming the roads which form the outer boundaries of the estate. If it appears at all likely from the contents of their letter that the Title Shown procedure can be applied to their case, they will be invited to the Registry for a preliminary discussion but if, owing to distance or other considerations, this might prove inconvenient, it can be waived. In that case the preliminary evidence next described should be furnished to the Registry as soon as possible. The value of a preliminary discussion lies in the fact that it is usually possible for the Registry officials to decide on the spot whether or not the procedure is capable of being used in the light of the particular facts then disclosed. If there is no preliminary discussion the vendor's solicitors may be put to the trouble and expense of supplying the preliminary evidence only to find, after a lapse of time, that the Registry is quite unable to proceed with the arrangements.

Evidence Normally Required

The evidence and documents described below are needed by the Registry as soon as possible after the preliminary interview has taken place. If they are already available they should be brought to the interview. They are:

(i) A plan of the estate on a scale of not less than 208 feet to the inch (1/2500) showing the precise location and extent of the vendor's unsold properties, which should be identified by a coloured edging. If an estate plan is already in existence, a copy of it may be supplied. If not, the Land Registry Plans Branch will quote the reference number of the sheet or sheets of the ordnance map on which the properties lie so that the desired plan can be prepared on a print of that map.

(ii) Three copies of a schedule of the properties on which they

are listed street by street. The ultimate letter as to title will be written by reference to one copy of this schedule.

(iii) An examined abstract of the complete title. In simple cases involving only half a dozen or so title deeds the Registry may be willing to hold them on loan and dispense with an abstract. In any event, particularly in cases where restrictive covenants have previously been imposed, the Registry may require production of the original deeds or some of them, but counterpart leases are not usually called for, except in isolated instances for the purpose of identifying particular properties.

(iv) A draft of the proposed conveyance to the purchasers, which should be in a standard form, allowing only for such variations as are necessary in the case of joint or corporate purchasers. In this connection the special conditions of sale should reserve to the vendor a right to supply the form of conveyance to the purchaser and, if this is done, it seems that there is no breach of the statutory provisions which make void any stipulation precluding a purchaser from employing his own solicitor (*d*). If blank spaces are allowed for the variations or additions needed in the cases of joint or corporate purchasers, the standard form of both the draft and the engrossment may conveniently be printed for issue to purchasers. The vendor's solicitors usually give an undertaking to the Chief Land Registrar that the standard form will be used for all sales without a significant alteration.

These four sets of documents need not necessarily be supplied simultaneously, but as the detailed identification of the properties usually absorbs more time than any other part of the work, the plan mentioned in item (i) above should, if possible, receive priority. The actual examination of the title usually takes, at most, a week, unless the deeds contain elaborate plans, so that normally any original deeds lent to the Registry are returned within about that period.

IDENTITIES OF PROPERTIES

It is the duty of every applicant for first registration to supply the Registry with sufficient particulars, by plan or otherwise, to enable the land he seeks to be registered to be fully identified on the ordnance map or the Land Registry general map (*e*). Therefore, immediately the preliminary evidence is received in the Registry, the Plans Branch seeks to identify each individual property described in the schedule (item (ii)) on the ordnance

(*d*) *i.e.*, the Law of Property Act, 1925, s. 48 (1).
(*e*) Land Registration Rules, 1925, r. 20 (iii).

map and to ensure that that property is also shown on the estate plan (item (i)). Difficulties sometimes arise as to the extent or identification of particular properties when they are of irregular shape, or include additional land at the back, or where there has been some recent development, or an aberration in street numbering has occurred. Again, there may exist cautions or priority notices against first registration (*f*), or even a conflicting (and thus rival) earlier registration. Furthermore, if any parts of the properties abut railways, canals, or similar public undertakings, or the sea shore, or lie above underground railways or aqueducts belonging to public authorities, the Registry will serve notices (with plans) on the undertakers or other owners and by this means ascertain in advance that all boundaries are in their proper position and indisputable. When all possible points of identity which might cause difficulty on first registration have been ascertained, the Registry will invite the vendor's solicitors to attend at Lincoln's Inn Fields, usually with the estate surveyor, in order to discuss and resolve the problems which have arisen. Sometimes it is necessary for the estate surveyor to make one or more visits to the site before he can provide a satisfactory solution. Sometimes a doubt about identity can be resolved if the vendor's solicitors undertake to supply a special plan for the contract and conveyance. Again, it is commonly necessary to determine in advance whether the soil of side and back passageways shall be sold with one property subject to rights of way in favour of all neighbouring owners, or whether a moiety or other part of a passage shall be sold with each property subject similarly to rights in favour of others. In the case of large estates or complicated titles further interviews are arranged as needful.

Meanwhile the title to the estate will have been approved by a legal officer, or approved subject to the fulfilment of stated conditions. The bespeaking of searches may be requested. Commonly the vendor or his responsible agent will be asked to make a statutory declaration proving (*inter alia*) that he still owns all the properties covered by the investigation and that he has not entered (as vendor) into any restrictive covenants or granted any easements on previous sales of parts of his estate. For this purpose the original estate plan upon which the Registry has worked is returned to the vendor's solicitors in order that it (not, let it be noted, a fair copy of it) may be exhibited to the declaration. Similarly, a copy of the schedule, amended as requisite by the Registry, must be made an exhibit. Contrary to normal practice,

(*f*) Under the Land Registration Act, 1925, s. 53, or the Land Registration Rules, 1925, r. 71.

the Registry is prepared, in this instance, to suggest the kind of evidence that the declaration should contain and to approve it in draft form.

The Letter as to Title

When all difficulties, both mapping and legal, have been resolved, the Registry issues its letter as to the title. If it should happen that problems of a stubborn or insoluble nature affect a particular house or small area on the estate, it may become necessary to exclude those parts from the general arrangement in order that the sales of the remainder of the estate may proceed smoothly and without delay. This might happen, for example, owing to an adverse claim or some defect of title affecting one house.

The letter as to the title will begin by stating unequivocally that the Chief Land Registrar will register as absolute the title of any purchaser from the named vendor of any of the freehold lands described in the attached schedule on production of:

(i) A normal application for first registration (*g*) accompanied by sufficient particulars to enable the land to be fully identified on the Land Registry general map (*h*). It is not unusual for the Registry to arrange with the vendor's solicitor that where the extent of a particular curtilage has been in doubt, that property shall be sold either by reference to a plan prepared *ad hoc* for attachment to the contract and the subsequent conveyance or, alternatively, by reference to the plan drawn on the existing counterpart lease when that plan clearly establishes the location and extent of the land. Properties to be sold by plan will be indicated in the schedule.

(ii) A conveyance by the vendor in the form provided by his solicitors (with a certified copy).

(iii) The counterpart lease.

(iv) A certificate of official search made in the Land Charges Department in reference to the particular property against the name of the vendor.

(v) The appropriate fee.

The letter will advise the vendors' solicitors that they are at liberty to produce it to any proposing purchaser's solicitor in order to assure him that he may implicitly rely upon absolute title being granted to his client provided he lodges, in proper order, the documents described. This is emphasised because the Chief Land Registrar declines to answer any kind of *ad hoc* inquiry from a

(*g*) *i.e.*, form 1B or, in the case of a corporation, 1E.
(*h*) In pursuance of the Land Registration Rules, 1925, r. 20 (iii)

would-be purchaser. It is further stated that the title of each purchaser will be registered subject to:

(i) Such registered head lease as would be disclosed by a search of the public index map. It should be observed that under the arrangements the Registry confines its examination to the reversionary title and does not scrutinise the counterpart leases or interest itself in the leasehold position. Therefore purchasers are strongly advised to make a free official search of the public index map (*i*) in order to ascertain what interests in the land are registered. Furthermore, if a purchaser who is also the lessee makes application to treat a lease (either registered or unregistered) as merged, the normal evidence of merger should be lodged and the appropriate fees paid (*k*).

(ii) The exceptions, reservations, restrictive covenants, and other interests mentioned or contained in the conveyance by the vendor.

(iii) Instruments and matters disclosed on the certificate of search which affect the purchaser's land.

(iv) Such restrictive covenants, easements, or other incumbrances as are indicated by the letter as affecting the land. Purchasers will be advised whether they are expected to produce the original deeds containing the incumbrances or verified copies, extracts, or abstracts of them.

The Registry does not charge any fee for this service, being content to rely solely upon the fees payable by purchasers for first registration. The question is bound to be asked: How long does the Title Shown procedure take? It is difficult to give a firm answer. In the case of a very large estate a great deal of mapping work is involved. Again, when problems arise, the speed of work in the Registry is dependent upon the time taken by the solicitors or estate surveyor to resolve them. So far, in estates of average size where no difficult problems have arisen, the Registry has usually been able to issue the letter as to title well within one month of the receipt of the estate plan and other preliminary evidence.

Special Conditions of Sale

As soon as the Registry agrees to apply the Title Shown procedure the vendor's solicitor will inevitably address his mind to the special conditions of sale. These (which do not, of course, concern the Registry) should state that the vendor's title has been

(*i*) In form 96; under the Land Registration Rules, 1925, r. 286.

(*k*) *i.e.*, 10s. in the case of a registered lease; otherwise under scale 1 of the Land Registration Fee Order, 1930, on the value of the leasehold interest.

deduced to the Chief Land Registrar who has undertaken to grant an absolute title to each purchaser who complies with the terms of the Registry's letter. A duplicated copy of the letter (containing, however, merely an extract from the schedule of properties, if it is a long one) may then be attached to the contract, and the purchaser should be precluded from making any investigation of title and from raising any requisitions upon title properly so-called, beyond inspecting the original letter and any deeds containing restrictive covenants or other incumbrances referred to in it. It may assist the easy acceptance of these terms if the vendor's solicitors undertake in the conditions of sale to satisfy the Registry on any question of title raised on first registration, but at the same time it is inconceivable that the Registry would call for any evidence from a purchaser who complied strictly with the simple requirements laid down in the letter. It may be added that no purchaser is concerned, when lodging his application for first registration, to call attention to the fact that he has bought under the Title Shown procedure because the Land Registry Plans Branch will have indexed the extent of the entire estate on the office pages of all relevant parcels books, so that it will be immediately apparent, when any application is lodged, that it relates to land within the arrangement. The furnishing of a standard form of conveyance has been mentioned previously.

It is, perhaps, scarcely necessary to mention that if any event occurs after the date of the Registry's letter which could in any way affect the title of the vendor, it would be the duty of his solicitors to inform the Chief Land Registrar of it immediately. Occasionally the vendor's solicitors discover, after receipt of the letter as to title, that one or more of the counterpart leases are missing. On proof of the facts the Registry will write a supplemental letter absolving the purchasers concerned from the need to produce the counterparts.

TOWN AND COUNTRY PLANNING ACT, 1959

By J. K. Boynton, m.c., ll.b., Solicitor

A previous article (*a*) examined the provisions of the Town and Country Planning Bill, which received the Royal Assent on July 16, 1959. The purpose of the present article is to give a reminder of its principal provisions and to consider some of the changes introduced subsequently to the Committee Stage in the First House. As there were over 300 Lords' amendments, occupying fifty-seven pages of print, it will obviously be impossible to notice more than a fraction of these. Fortunately the great majority were of a drafting character.

The Act came into force on August 16 last.

As a result of the Second House widening of the obligation to buy premises suffering from what is commonly known as " planning blight," the Act now contains five parts which may be summarised as follows:

Summary of Main Provisions

Part I makes market value the basis for all public and local authority acquisitions after October 29, 1958: it contains provisions by which additional compensation will become payable for additional planning permissions granted within five years of purchase. It makes it possible for weekly tenants to be compensated for removal expenses and trade disturbance. And it provides machinery to bring to a conclusion certain long-standing notices to treat.

Part II relaxes Government control over the sales and purchases of land by local authorities and some other public bodies. But a purchaser will be protected if the authority have failed to get a necessary ministerial consent—now only needed in rare cases.

Part III implements recommendations of the Franks Committee. In future any planning application must be accompanied by a certificate in prescribed form. This is designed to secure that owners of land and agricultural tenants are given notice of applications relating to their land. Some classes of application will in future have to be publicly advertised, *e.g.*, slaughterhouses.

(*a*) *Ante*, p. 86.

This Part contains (s. 38) provisions to plug the hole made in enforcement powers of planning authorities by the decision in *Cater* v. *Essex C. C.* (*b*).

Part IV provides a remedy for owner-occupiers of property affected by planning blight. It gives them a right to serve a notice requiring the authority whose scheme proposes the future acquisition of their property, to purchase forthwith at an "unblighted" price. But the only properties receiving help are (a) houses, (b) farms and market gardens, and (c) other properties not exceeding £250 net annual value for rating purposes.

Part V contains miscellaneous provisions, none of which merit special notice.

I. Compensation for Compulsory Purchase

It is simple enough to say "compensation for acquisitions by local authorities shall be the price which the property would obtain in the open market." This is the sort of approach which Captain Corfield's Private Bill made to this problem. Why, then, has the Government found it necessary to devote something like ten sections of the new Act to making this amendment of the law?

The answer is that today the value of property cannot be considered without regard to the planning permissions which may be obtainable in respect of it. Where land is to be acquired by a local or public authority it is being withdrawn from the market and the uses to which it will be put after acquisition may well have no commercial counterpart. Nor is it possible to obtain a planning permission for a use other than that proposed by the acquiring body. The planning authority would be bound to safeguard the proposed public use and refuse any application for an alternative.

This is the broad situation which Part I of the Act attempts to deal with. It does so by providing that certain assumptions shall be made about the land to be acquired, including assumptions that certain planning permissions exist. Armed with these assumptions it should be possible for the valuers on both sides to consider what the land would, in the light of the statutory assumptions, fetch in the open market.

Existing permissions, etc.

An amendment made to the Bill (s. 2 (1) and (2)) has put it beyond doubt that the valuers on both sides are to have regard not only to the statutory assumptions but to anything which the

(*b*) [1959] 2 W.L.R. 739.

market would take into account in assessing value. Thus, for example, any existing permission has to be considered and a search should always be made of the Register of decisions kept under section 14 of the Town and Country Planning Act, 1947, to ascertain the past planning history of the land in question.

Where the proposals of the acquiring authority have a commercial equivalent there should not normally be much difficulty in assessing compensation on acquisition. For example, if a local authority are buying land for housing, they will almost certainly have obtained an outline permission for housing before opening negotiations. Housing value will probably be the market value. The same position arises where municipal offices are to be erected, or a local authority are setting up a central supplies and printing department—both projects have commercial equivalents.

Development plan cases

Sometimes the property to be acquired will be shown in the approved Development Plan. Then an assumed permission comes into being for the " planned use." This permission will be subject to such conditions as might reasonably be expected to be imposed in the circumstances of the case: and it may be a future permission if the programme map indicates that immediate development is not intended (s. 4 (6)).

One of the deficiencies of the section is that there are no statutory means by which an owner can obtain an interpretation of the Development Plan from the local planning authority. Theoretically at least the valuers on each side will have to read the plan provisions and attempt their own solution of the difficult but important question, " What sort of permission would I get and subject to what conditions? Can I expect permission for ten or twenty houses?, etc."

On this the Ministry's Circular No. 48/59 says this to local authorities: " The provision of factual information when requested should present no problems to the authority or their officers. But sometimes officers will in addition be asked for informal opinions by one side or the other to the negotiations. For example, they may be asked to assist in interpreting the relevant provisions of the development plan in a case falling within section 4: or as to the planning permissions which might be assumed in cases where no formal certificate can be applied for, *e.g.*, where the land is in a comprehensive development area. It is for authorities to decide how far informal expressions of opinion should be permitted with a view to assisting the parties to an acquisition to reach agreement.

Where they do give it the Minister suggests that the authority should—

(a) Give any such advice to both parties to the negotiation;

(b) Make clear that the advice is informal and does not commit them if a formal certificate or planning permission is sought."

Any dispute about the interpretation of the Development Plan and the assumed permission arising will be dealt with by the Lands Tribunal.

Certificates of alternative development

It will be remembered that in three classes of case an owner or an acquiring authority can obtain a certificate from the local planning authority. This will certify the classes of development which might reasonably have been expected to be granted if the land were not proposed to be acquired by a public or local authority. The three classes are:

(a) No approved Development Plan—a rare case and becoming rarer.

(b) Where the approved Development Plan leaves the site without notation—the likely position in rural areas, green belts and areas of special landscape value, *e.g.*, a school site on the fringe of a large village.

(c) Where the site is earmarked in the approved Development Plan for some public purpose.

The Lord Chancellor had this to say (*c*) on the approach to be made by local planning authorities to the certificate system (*d*): "Perhaps the most important point is that they should approach the question on broad and common-sense lines, remembering that a certificate is not a planning permission but a statement to be used in ascertaining the fair market value of the land. . . . The planning authority will be expected to determine this question in the light of the character of the development in the surrounding area, as existing or planned, and exercising their judgment as planning authority as to what development would be appropriate, excluding only those forms of development which for some reason or other are inappropriate.

"Some cases will be simple. For example, where land is surrounded by houses, a certificate for residential development would normally be appropriate. Other cases will be more arguable. Where the site is within a built-up area it is to be expected as a

(*c*) His remarks have largely been reproduced in the Ministerial Circular No. 48/59.

(*d*) *Hansard*, House of Lords, for June 22, 1959, col. 7.

rule that the certificate would indicate some form of development. On ' white land ' outside the built-up area the planning authority would no doubt consider carefully whether any development at all would be appropriate, other than that proposed by the acquiring authority."

In deciding an application, the planning authority can disregard the provisions of the Development Plan (s. 5 (7)).

Procedural points

(a) Certificates can only be applied for by the acquiring authority and a person entitled to an interest in the land (s. 5 (10)). The application must be accompanied by a map (*e*).

(b) A copy is to be sent to the other party concerned, and no certificate is issued by the planning authority for twenty-one days thereafter (to allow the other party to make representations). Two months are allowed to the authority to deal with the application (*f*).

(c) A certificate can be applied for when the authority offer in writing to negotiate for the land, or notify the submission of a compulsory purchase order (s. 8 (2)).

(d) An appeal lies to the Minister of Housing and Local Government within one month (*g*).

(e) Any person with an interest in the land can obtain information about the application (*h*).

Long standing notices to treat

Fortunately for practitioners the onus of making a move in the case of long standing notices to treat (*i*) rests with the acquiring authority. A form of Notice of Intention to proceed has been prescribed in the Schedule to the Town and Country Planning (Prescribed Forms of Notices) Regulations, 1959 (*k*). The notice contains a detailed explanation of the rights of the owner. Bearing this in mind, and there are only about 1,000 such cases in the country, any further elaboration of what was written at p. 95, *ante*, seems pointless.

The authorities concerned must take action by February 16, 1960, or their powers lapse (s. 14 (2)).

(*e*) Town and Country Planning General Development Order, 1959 (S.I. 1959, No. 1286), art. 3 (1).
(*f*) *Ibid.*, art. 3 (2).
(*g*) *Ibid.*, art. 4 (1).
(*h*) *Ibid.*, art. 5.
(*i*) These are notices served before August 6, 1947, but not concluded by entry, assessment of compensation or the like (s. 14 (1)). Entry after the Bill was published (October 20, 1958) will not remove the case from the provisions of the Act (s. 16).
(*k*) S.I. 1959, No. 1287.

Additional compensation

A person whose land is acquired compulsorily or by agreement is entitled to additional compensation if within five years of completion planning permission is granted for "additional development." The measure of additional compensation is the difference between the compensation as assessed on sale and that which it would have been if the additional planning permission had been in force at the time of sale.

The provisions of sections 18–20 will undoubtedly cause considerable work for acquiring and planning authorities who must for five years keep track of their purchases in order to comply with the Act. Indeed, some may consider that the provisions are so complicated as to be nearly unworkable.

For practitioners the important points are as follow:

(a) When selling to a local or public authority, an address for service should be given to the purchaser under section 19 (1). This should make it easier to keep within the six months' time limit for claims mentioned in section 19 (3).

(b) The right to compensation will normally remain in the former owner. But it will pass to a personal representative or trustee in bankruptcy, and apparently it may be assigned (s. 18 (5)).

(c) "Additional development" is defined in section 18 (8). It does not include, in the case of a local authority, development for the purposes of the power or duty (*l*) for which they acquired the land. It is therefore desirable that the power under which the land is acquired (which sets the limit) should be mentioned in the conveyance.

(d) The acquiring authority remains liable to pay the compensation even after they have parted with the land. A purchaser of such land *from* the local authority may reasonably expect that on sale the authority will want an indemnity to secure that they do not have to pay for an additional permission obtained by the purchaser after completion.

II. Local Authorities Land Transactions

Before the new Act came into force it was usual for a purchaser from a local authority to call for the Ministerial consent which was necessary in nearly every case by virtue of section 164 of the Local Government Act, 1933.

Today such a consent is only needed in the case of certain special transactions, *e.g.*, the sale of an open space, a subsidised

(*l*) See s. 18 (8) (a) and the definition of "function" in s. 57.

council house or land acquired as a result of a compulsory purchase order (s. 26).

What is more important is that at a late stage (largely as a result of pressure from the Law Society) the Government introduced into the Bill a clause which gives protection to purchasers in cases where a necessary consent has not been given.

Further, a person dealing with the authority or with a person claiming under the authority, is not concerned to see or inquire whether any necessary consent has been given. The purchaser is, therefore, not only protected, but absolved from the need to make any inquiries at all of the vendor authority. This will simplify conveyancing.

III. Administrative Procedures

It will be recalled that Part III deals with procedural matters and largely springs from the recommendations of the Franks Committee.

Challenge in High Court

Section 31 provides a right of challenge broadly speaking to all orders or Ministerial decisions relating to the control of development under Part III of the Act of 1947. This right may be exercised by the local planning authority as well as a person aggrieved.

Section 17 determinations

Section 32 allows for an appeal to the High Court from a determination of the Minister under section 17 of the Act of 1947. This is the section which permits a prospective developer to ascertain whether his proposals do or do not require planning permission. Here again, as a result of an amendment to the Bill, the right of appeal may be exercised by the local planning authority as well as the applicant.

Purchase notices

Section 35 amends section 19 of the Act of 1947 relating to purchase notices so as to give an applicant a right to be heard in all cases. Various other amendments are made and the section as amended will be found set out in the Ninth Schedule to the new Act. In future a willing local authority may take up a purchase notice without the need for Ministerial consent.

Publicity for planning applications

The Minister has prescribed certain classes of development where in future a public advertisement of a planning application

will have to be given by the prospective developer. The prescribed classes include, besides the more obvious things like sewage works, refuse disposal tips and slaughterhouses, the following: "Construction of buildings and use of buildings for any of the following purposes, namely, as a theatre, a cinema, a music hall, a dance hall, a skating rink, a swimming bath, a Turkish or other vapour or foam-bath, a gymnasium, or a building for indoor games" (*m*).

At first sight this wording seems wide, *e.g.*, a church hall in which table tennis would be played is presumably a building for indoor games. The test under section 36 of the Act is, however, whether permission is sought for development of one of the prescribed classes. So if a gymnasium formed part of a school, it seems that the application to build the school would not have to be advertised. The application for planning permission would be for a school which is not a prescribed class of development. The incidental use of part of the building as a gymnasium would not be caught.

A form of newspaper advertisement has been prescribed, and a planning authority must allow twenty-one days for representations to be made as a result of the application being advertised.

Notice to owners

The Act also contains a procedure to ensure that owners of land and agricultural tenants receive notice of any application affecting their land (s. 37).

In future an application cannot be considered by the planning authority unless it is accompanied by one of the prescribed certificates (*n*). The procedure is as follows:

(a) Where an applicant is the sole owner or tenant of all the land he will certify this on Certificate A.

(b) If he is not the owner, *e.g.*, is a prospective purchaser, he must serve Notice No. 1 on the owner(s) and complete Certificate B.

(c) Where there are multiple ownerships, the applicant must notify them all if he knows all their names and addresses.

(d) If the applicant knows some but not all the owners concerned he must notify those he knows and advertise the application in a local newspaper not earlier than twenty-one days before the date of the application.

In every case the applicant must state either (a) that none of the land is an agricultural holding or (b) that all agricultural tenants have been notified.

(*m*) Town and Country Planning General Development Order, 1959, art. 7.

(*n*) The forms of notices and certificates are prescribed by the Town and Country Planning General Development Order, 1959.

The " owners " who must be notified of planning applications include leaseholders with ten years or more of their term still to run.

A tenant will not normally have to notify his landlord under section 37 (tenancy is defined in section 57 as having the same meaning as in the Landlord and Tenant Act, 1954). But, of course, this does not affect any contractual obligation under the tenancy agreement.

Enforcement notices

In *Cater* v. *Essex C. C.* (*o*) an enforcement notice alleged that the retention of certain caravans after the expiry of the 28-day limit on temporary uses amounted to development for which no planning permission had been given. The Divisional Court held that the 28-day permission granted by the General Development Order, 1950, Class IV (2), was a permission and that the notice was invalid because it alleged that no permission had been given.

The only other way in which the notice could have been drafted would have been to allege that the retention after the 28-day period amounted to a breach of a condition in a planning consent. The difficulty here is that the reference to the 28-day period does not appear under the column " Conditions " in the Schedule to the General Development Order. It is a limitation appearing in the permission itself.

To overcome this difficulty the new Act provides, in section 38, that for the purposes of serving enforcement notices under sections 23 and 24 of the Act of 1947, non-compliance with a limitation in a Development Order shall be equivalent to a breach of a condition in a planning consent. To make assurance doubly sure, subsection (2) of section 38 provides specifically that a time limit included in a permission granted by a Development Order is to be construed as a permission subject to a limitation. Future enforcement notices for caravans will therefore allege not development without permission, but non-compliance with the limitation taken to be imposed by subsection (2).

Although the clause was originally introduced with a power to take retrospective action, this was removed in the Commons. Those caravans which on August 16 were outside the four-year time limit for enforcement action have acquired a permanent immunity.

(*o*) [1959] 2 W.L.R. 739.

IV. Obligation to Purchase Land Affected by Planning Proposals

The provisions of the Act dealing with the purchase of land rendered unsaleable by planning proposals show very considerable changes from those in the Bill as introduced.

Although the Government stood firm against extending the provisions to cover "investment" land, *i.e.*, land not occupied by the owner, the classes of owner who can benefit are much widened.

Who may benefit?

(a) Owner-occupiers of any hereditament (*p*) which does not exceed the prescribed limit (*q*), *i.e.*, a net annual value for rating purposes of £250. The owners of small shops and businesses will be able to claim under this head.

(b) Resident owner-occupiers of private dwellings. There is no limit of value here. A shop or business with living accommodation over would qualify under this heading whatever the net annual value, provided that both were the subject of a single entry in the valuation list.

(c) Owner-occupiers of agricultural units, *i.e.*, land occupied as a unit for agricultural purposes, including the farmhouse. In the case of farms, market gardens, etc., the Act provides in effect that the authority need only acquire that part which is actually affected by the planning proposal (see ss. 40 (2) and 43 (5)).

The Bill used the word "individual." The Act refers to "person," so that a limited company can claim (*r*). Special provision is made in paragraph 5 of the Fifth Schedule for partnership firms.

In all cases the owner-occupier must have been in occupation for six months within the twelve months preceding the service of a notice to purchase: the detailed provisions are in section 43.

What gives rise to the right?

The right to serve a notice requiring purchase arises in the six cases set out in section 39.

Most planning proposals in a Development Plan will be covered,

(*p*) Hereditament is defined as the aggregate of land forming the subject of a single entry in the valuation list. But land which is rated because of shooting, fishing or advertising rights is not included (Fifth Sched., para. 3 (3)).

(*q*) Town and Country Planning (Limit of Annual Value) Order, 1959 (S.I. 1959, No. 1318).

(*r*) See also Fifth Sched., para. 5 (2).

as will road proposals which are based upon the authority of a statutory order or scheme.

It is worth noting that in addition to these firm and formal proposals, the section also provides that the right arises if the land "is land shown on plans approved by a resolution of a local highway authority as land comprised in the site of a highway as proposed to be constructed improved or altered by that authority."

Miscellaneous points

(a) The owner can withdraw his notice within six weeks after he has seen what compensation will be payable (Fifth Schedule, para. 8).

(b) Tenants can claim if they have a term of years certain with not less than three years to run (s. 43 (7)).

(c) The authority concerned can object to purchasing by serving a counter-notice on any of the grounds in section 40. They can thus avoid purchase if there has been a change in plan since the proposal was first published (s. 40 (2) (b)).

(d) No compensation will be payable for severance or disturbance, unless part of a farm is acquired when compensation for severance is allowable.

Conclusion

Compensation for planning refusals and restrictions is still payable only to the extent of the unexpended balance of established development value. The provisions of the Act of 1954 are not altered in this respect.

Section 33 of the Act of 1954, which gave protection to purchasers in certain circumstances of land subsequently acquired compulsorily, is repealed with the whole of Part III of the 1954 Act. Inquiries by purchasers' solicitors under section 33 will no longer be appropriate.

There are important provisions in the Act relating to discretionary payments for removal and disturbance expenses to weekly and monthly tenants (s. 13); acquisition of houses unfit for human habitation (s. 10); war damaged land (ss. 11 and 45); and areas of comprehensive development. These were noticed in the previous article. These provisions were not substantially altered after the Committee stage in the Commons and are not mentioned further for this reason.

The new Act is undoubtedly the most important Act in the field of town and country planning since 1947 and its main provisions deserve attention by all.

THE LAW OF HIGHWAYS

III. Maintenance and Improvement *

By J. F. Garner, ll.m., Solicitor

The common law on the subject of the maintenance of a highway was reasonable enough; unless responsibility had attached to an individual for the maintenance of a particular highway by reason of tenure, enclosure or prescription, the highway was assumed to be maintainable by the inhabitants at large, and, if that duty was not properly performed, the inhabitants at large could be indicted for an offence against the ordinary criminal law at quarter sessions. The Highway Act, 1835, modified the position but not the general principle, by providing that "new" highways (*a*) coming into being after 1835 were to be repairable by the inhabitants at large only if they were expressly adopted by the highway authority, by the somewhat formal procedure of the Act. This detailed procedure has often not been followed, but the courts have decided (*b*) that where it can be established that the local authority have repaired a highway in the past, that highway will be presumed to be repairable by the inhabitants at large (*c*). The exact relationship between the modern highway authority and the inhabitants at large has been far from clear (*d*), and until the Highways Act, 1959, became law there were some highways in respect of which a responsibility to repair could not have been clearly established.

The new Act therefore in this respect steps outside its consolidating functions and makes fundamental changes in the law. In the first place, by section 38 (1), the Act abolishes the duty

---

* This article is the third in the series on the subject.

(*a*) This did not apply to footpaths, as the word appearing in s. 23 of the 1835 Act was "road": *Robinson* v. *Richmond Corporation* [1955] 2 W.L.R. 333.

(*b*) The question has most frequently arisen in connection with liability for private street works expenses; see, *e.g.*, *Cababé* v. *Walton-on-Thames U. D. C.* [1914] A.C. 102. Where the formal procedure was not followed the case could arise (before the coming into operation of the new Act) where no one would in law be responsible for the maintenance of a particular highway.

(*c*) On the other hand, evidence that no money has ever been spent on a road is *not* conclusive that it is not repairable by the inhabitants at large: *Huyton with Roby U. D. C.* v. *Hunter* [1955] 2 All E.R. 398.

(*d*) The surveyor of highways, then the highway boards, and then the several highway authorities (but probably *not* the Minister as he is not a successor of the surveyor of highways), each in turn succeeded to the inhabitants of the parish, but the latter's duties were not displaced: see *Att.-Gen.* v. *Staffordshire C. C.* [1905] 1 Ch. 336, and *R.* v. *Poole Corporation* (1887) 19 Q.B.D. 608.

formerly imposed on the inhabitants at large of any area. It then defines with some precision which highways shall be "highways maintainable at the public expense" (*e*), and imposes on the highway authority an express duty to maintain any such highway (*f*). The former procedure of an indictment preferred before quarter sessions in respect of neglect to maintain a highway is abolished (*g*), and proceedings in the magistrates' court are substituted therefor. We must now consider some of these and the related provisions in more detail.

1. How a Highway May Become Maintainable

Section 38 lists the types of existing highways which are to be treated for the purposes of the Act as being highways maintainable at the public expense (*h*). Section 39 goes on to replace the former procedure of the 1835 Act by providing that a newly dedicated highway may become repairable at the public expense, where the council of the county, borough or urban district concerned certify (*i*) in the terms of the section, and no complaint is made by them to the local magistrates for an order to the effect that "the proposed highway will not be of sufficient utility to the public to justify its being maintained at the public expense." This section applies to any kind of highway, not being restricted in its terms to roads (*k*).

Section 40 enables a highway authority to adopt liability to maintain a highway by agreement with a private person who is liable to maintain the highway under some special enactment, or by reason of tenure, enclosure or prescription (*l*). Section 41 (which replaces the Agriculture (Improvement of Roads) Act, 1955, s. 1 (6), and *not* the Miscellaneous Provisions Act, 1955, s. 1 (6)), provides that a highway may become maintainable at the public expense where the "appropriate council" declare it to be such under section 1 of the 1955 Agriculture Act.

Under section 42, certain bridges and highways carried thereby (including the approaches thereto) may become maintainable at the public expense by virtue of an agreement or an order made under the Bridges Act, 1929, which will continue to apply to

(*e*) s. 38 (2).
(*f*) s. 44 (1).
(*g*) s. 59 (1).
(*h*) See the first article in this series, *ante*, p. 162.
(*i*) If the council refuse so to certify, the person by whom the highway was dedicated "or his successor" may appeal to the magistrates.
(*k*) Thereby abolishing the special exception recognised in *Robinson* v. *Richmond Corporation*, *supra*.
(*l*) This power does not apply to widenings of highways or to adoption of highways after the execution of private street works.

bridges situate partly in the London Couunty Council area and partly in some other local government area. An express power to adopt a private street (which is not necessarily, prior to such adoption, a highway at all) as a highway maintainable at the public expense is given to the appropriate county, borough or urban district council by section 43, to be exercised in accordance with Part IX of the Act dealing with the making up of private streets.

2. The Duty of Maintenance

As mentioned above, section 44 (1) for the first time in English law imposes on the highway authority an express duty to maintain any highway—of any category—which is maintainable at the public expense. It is not clear what is the standard required of the highway authority in executing this duty; obviously it will vary according to the type of highway and the kind of traffic that may normally be expected on it (*m*). The "enforcement" section (*n*) refers to a highway being "out of repair," and empowers the court to order the highway to be put in "proper repair." Somewhat naturally, these expressions are not defined in the Act, and it is doubtful whether the court could specify in its order what it considered would be "proper repair" in a particular case. It seems probable that the court would not be able to require a higher standard of repair than the condition which the road was in when first dedicated to the public (*o*), except where the highway authority have since that time maintained the highway to a higher standard (*p*).

In executing, or attempting to execute, this duty to keep a highway in repair, the highway authority are given certain statutory powers to assist them:

(a) They may obtain gravel and other materials ("scrapings" are vested in the authority: see s. 226 (1)) from any common or waste land, subject to certain restrictions, and they may also gather and carry away stones lying on land in the district; and further powers to obtain materials from inclosed land in the district, or to quarry stone,

(*m*) As to "extraordinary traffic," see s. 62, and below.

(*n*) s. 59, *post*.

(*o*) In general terms, the public in accepting a highway dedicated for their use, must take it as they find it: see, *e.g.*, *Owen* v. *De Winton* (1894) 58 J.P. 833. As to footpaths and bridleways, see ss. 59 (6) and 30 (3) of the 1959 Act.

(*p*) In the old cases on the duty imposed on the inhabitants at large at common law, it was said that the question is not whether the road is in as good repair as it ever was, or usually has been, but whether it is in a state of sufficient repair, with reference to the present use of it: *R.* v. *Henley* (*Inhabitants*) (1847) 10 L.T.(o.s.) 110; *R.* v. *High Halden* (*Inhabitants*) (1859) 1 F. & F. 678.

may be conferred on them by order from the local magistrates (*q*). In the exercise of their powers under this section the highway authority must pay compensation to the persons interested in the land for any damage done (*r*). Section 49 makes provision for precautions to be taken where an excavation is made in the exercise of these powers.

(b) By the Public Utilities Street Works Act, 1950, the highway authority can exercise some measure of control over the number and timing of the occasions when the surface of a highway for which they are responsible is broken open by statutory undertakers, and they can also ensure that reinstatement of the surface is properly effected.

(c) Section 62 of the 1959 Act replaces section 54 of the Road Traffic Act, 1930, dealing with "extraordinary expenses" (having regard to the average expense of maintaining that or similar highways) incurred or to be incurred by the highway authority, "by reason of damage caused by excessive weight passing along the highway, or other extraordinary traffic thereon." In certain circumstances those expenses will be recoverable from the person responsible (*s*). A somewhat similar power is given by section 63 (*t*), enabling the highway authority to recover from statutory undertakers concerned any additional expenses incurred in strengthening a highway or making good damage occasioned thereto, where the highway is used as an alternative route for a highway closed or restricted (*u*) in use, so as to enable the undertakers to carry out works in the highway so closed or restricted.

(d) If the highway authority are of the opinion that a highway maintainable at the public expense by them is "unnecessary for public use," they may apply to the local magistrates for an order that it shall cease to be so maintained (*w*). Where such an order has been duly made, the court can subsequently, "in consequence of any change

(*q*) s. 48 of the 1959 Act.

(*r*) *Ibid.*, s. 48 (7).

(*s*) The 1930 Act section, which itself replaced s. 23 of the Highways and Locomotives Amendment Act, 1878, gave rise to very considerable litigation, which is fully discussed in Pratt and Mackenzie's *Law of Highways* (19th ed.), at pp. 575 *et seq.* The new section enables expenses to be recovered whether or not the repairs have been effected, to this extent differing from the 1930 Act. The expenses, not being made recoverable from the owner for the time being, are not a charge on the land and are *not* registrable in the local land charges register.

(*t*) Replacing s. 27 (2) and (3) of the Public Utilities Street Works Act, 1950.

(*u*) By order made under s. 47 of the Road Traffic Act, 1930 (as amended).

(*w*) s. 50; this section may not be used in respect of a trunk or special road, a footpath or a bridleway.

of circumstances," and on the application of a person "interested in the maintenance of the highway," order that the highway shall again be a highway maintainable at the public expense (*x*).

The duty of a highway authority to maintain a highway maintainable at the public expense is now made enforceable by proceedings under section 59 of the 1959 Act, which may be commenced by any person who alleges that the highway is "out or repair" (an expression which is not defined). The complainant (*y*) must first serve a notice on the highway authority (*z*) requiring them to state whether they admit the way or bridge in question is a highway and that they admit they are liable to maintain it. The subsequent proceedings may then take one of two alternative forms:

(a) If *no* counter-notice of admission is served on the complainant within a month, the next move is with the complainant, and if he wants to take the matter any further (*a*), he must then apply to quarter sessions by giving written notice to the clerk of the peace (see s. 60 (2)), for an order, if the court finds that the way or bridge is a highway which the authority are liable to repair, and that it is out of repair, to the effect that the authority shall put it in "proper repair" within a reasonable period (to be specified); *or*

(b) If within a month the highway authority serves on the complainant a notice admitting that the way or bridge is a highway *and* that they are liable to maintain it, the complainant must then, if he wishes, apply within six months to the local magistrates for an order if the court finds that the way or bridge is out of repair, to the effect that the authority shall put it in "proper repair" within a reasonable period (to be specified).

Under either of these procedures the court may (but need not) hold a view, and if the order has not been complied with at the expiration of the period specified in the court's order, the complainant may be authorised to carry out the necessary

(*x*) s. 51.

(*y*) This may be any person; he does not have to show himself to be a "person aggrieved" or to have any special interest in the maintenance of the way in question.

(*z*) Or the private individual on whom (in the particular case) it is alleged a responsibility to maintain the highway rests.

(*a*) In practice, it seems probable that a highway authority will not often serve such an admission notice.

works himself at the expense of the person responsible (*b*). Apart from this procedure, the highway authority may carry out repairs to any highway which is maintainable by some private individual under a special enactment or by reason of tenure, enclosure or prescription (*c*), and then recover their expenses from that private individual (*d*).

A highway authority's responsibilities towards passengers on the highway in cases where injuries are caused by reason of the condition of the highway are not affected by the 1959 Act. If they have carried out their duty to maintain the highway negligently, they will be liable for any damage arising as a consequence of that negligence, but the fact that they are now under an express duty to maintain the highway will not operate so as to negative the special defence of "non-feasance" (where they have failed to carry out repairs, and such failure is shown to have been the cause of the plaintiff's injury) open to the highway authority as successor to the inhabitants at large (*e*). This defence is, therefore, at least for the present, still available to the local highway authority, but not to the Minister in respect of a highway for which he is the highway authority (*f*), nor can it be pleaded by a local authority acting otherwise than as highway authority (*g*).

3. The Improvement of Highways

Part V of the Act, like several other provisions in this statute, commences with a statement of general principle, in that it provides that any highway authority shall have power to carry out, in relation to any highway maintainable at the public expense by them, any work for the improvement of the highway, other

(*b*) Even where the respondents are the highway authority; so a private individual may find himself in the position of being authorised to execute repairs to a main road.

(*c*) Provisions regulating the circumstances where this liability may exist are contained in ss. 52–58 of the Act.

(*d*) 1959 Act, s. 61. The expenses may be recovered summarily or in any court of competent jurisdiction: *ibid.*, s. 264 (6).

(*e*) 1959 Act, s. 298, which expressly saves this defence. It is understood that an amending Act may be introduced within the next year or two, and that this doctrine will then be abolished. The oldest authority for the common law defence is usually given as *Russell* v. *Men of Devon* (1788) 2 T.R. 667, and the explanation given is that the inhabitants at large, being liable criminally, cannot also be made liable in a civil action. For a modern example where the defence was successful, see *Wilson* v. *Kingston-upon-Thames Corporation* [1949] 1 All E.R. 679.

(*f*) He is not the successor to the inhabitants at large: see *Swain* v. *Southern Ry.* [1939] 2 K.B. 560, where the point arose in connection with a railway company.

(*g*) For example, as sewer authority (*White* v. *Hindley L. B.* (1875) L.R. 10 Q.B. 219) or as road traffic authority (*Skilton* v. *Epsom & Ewell U. D. C.* [1937] 1 K.B. 112).

than work for lighting it (*h*). Section 64 then proceeds to list a number of the more elaborate kinds of highway improvement which may be carried out under one or other of the express powers (in most cases conferred on some classes of highway authority only) contained in Part V.

These express powers to execute improvements may be summarised as follows:

(a) The provision of dual carriageways (but not four road highways, as distinct from three or four "lane" highways) and roundabouts (*i*).

(b) The provision of a cycle track in or by the side of any maintainable highway consisting of or comprising a made-up carriageway (*k*).

(c) The provision of a footway in any case where the highway authority consider it necessary or desirable for the safety or accommodation of pedestrians, in or by the side of any maintainable highway consisting of or comprising a made-up carriageway (*l*).

(d) The provision of raised paving, guardrails, etc., for the purpose of safeguarding persons using the highway (*m*). Refuges for the protection of pedestrians crossing the carriageway in a maintainable highway are dealt with in a separate section (*n*).

(e) Subways may be constructed for the purpose of protecting traffic along a highway from danger, or of making the crossing of it less dangerous to pedestrians (*o*), but this applies only to a highway in a borough or urban district consisting of or comprising a "made-up carriageway" (*p*).

(f) Margins must be provided in or by the side of a maintainable highway where the highway authority consider it necessary or desirable for the safety or accommodation of ridden horses and driven livestock (*q*).

(g) The highway authority may secure the widening of a highway by any one or more of the following methods:

(i) by acquiring the necessary land (*r*);

(*h*) 1959 Act, s. 64 (2). Lighting powers are in some cases expressly covered in the sections discussed below: street lighting generally is not the concern of the highway authority as such.

(*i*) *Ibid.*, s. 65.

(*k*) *Ibid.*, s. 66.

(*l*) *Ibid.*, s. 67 (1).

(*m*) *Ibid.*, s. 67 (2).

(*n*) *Ibid.*, s. 68.

(*o*) *Ibid.*, s. 69.

(*p*) Defined in s. 295 (1).

(*q*) 1959 Act, s. 70.

(*r*) *Ibid.*, s. 214; it is explained in s. 64 (1) that the powers of Part V are to be regarded as means of effecting "improvements."

(ii) by appropriating land already owned by them for the purpose (*s*);

(iii) by entering into a dedication agreement with the owner of the land required (*t*); or

(iv) by action under section 205 of the Act where provision has been made in the development plan (*u*).

Other controls over the land adjoining a highway exercisable by the highway authority will be discussed in the next article in this series.

(h) Alterations in levels of a highway may be effected by the highway authority under sections 77 and 78, and section 79 provides for the construction of a bridge to carry a maintainable highway.

(i) Cutting off corners in a highway may be effected under section 80 (*w*), and section 81 replaces the provisions of the Roads Improvement Act, 1925, designed to prevent obstructions to view of persons using the highway at corners, bends or road junctions. A notice may be served (*x*) on the owner or occupier of land, directing him to alter a wall, fence or vegetation, etc., or on the owners, lessees and occupiers restraining them absolutely or conditionally from causing or permitting any building, etc., on a specified piece of land. Any such restriction, subject to registration in the local land charges register, will be binding on subsequent owners and occupiers of the land concerned.

(j) Section 252 of the 1959 Act gives a power to any local authority in whose area the section applies (*y*), to require the corner of any building intended to be erected "at the corner of two streets," to be rounded or splayed off to the height of the first storey or to the full height of the building and to such extent otherwise as they may determine. Compensation is payable in respect of any

(*s*) Under s. 163 of the Local Government Act, 1933, as amended by the Town and Country Planning Act, 1959.

(*t*) This is given as an express power, for the first time, by s. 71 (1) of the 1959 Act.

(*u*) The highway authority may also vary the relative widths of the carriageway and of any footway: 1959 Act, s. 76.

(*w*) The necessary land may be acquired under the general powers of s. 214, *ibid.*

(*x*) A recipient of such a notice may object within fourteen days to the highway authority, and the matter is then determined by an arbitrator or the county court (see s. 81 (6)). Any person sustaining loss is entitled to compensation (s. 81 (9)), and a person on whom a notice is served is entitled to recover his expenses in complying with the notice from the highway authority (s. 81 (10)).

(*y*) See s. 290 and the Nineteenth Schedule.

loss (*z*), and any person aggrieved by any such requirement may appeal to the local magistrates (*a*).

(k) The highway authority may plant trees and shrubs and lay out grass verges in maintainable highways (*b*), and any such trees, etc., will vest in the highway authority (*c*).

(l) The Minister has power to light a trunk road (*d*), although a local authority may already be empowered to light all the roads within their district (*e*), and a county council have certain powers to light a county road within the county (*f*).

(m) The highway authority may, under section 85, erect and maintain (and alter or remove) fences or posts for the purpose of preventing access to a maintainable highway. At first sight this section seems to override the common law principle that a frontager to a highway can have access thereto at any point (*g*), but the section is not really as sweeping as it seems, for the powers given thereby to the highway authority may not be exercised so as to:

(i) interfere with a fence or gate required for the purpose of agriculture;

(ii) obstruct a public right of way;

(iii) obstruct any means of access for the construction, formation or laying out of which planning permission has been granted (*h*); or

(iv) obstruct any means of access which was constructed, formed or laid out before July 1, 1948 (*i*).

The highway authority also may erect, maintain, alter or remove posts or stones to mark the boundary of the highway (*k*).

(*z*) To be determined by arbitration or, in default of agreement, by the county court: see s. 267 of the 1959 Act.

(*a*) *Ibid.*, s. 252 (2); the procedure is to be by way of complaint for an order: s. 274 (1).

(*b*) 1959 Act, s. 82.

(*c*) If the highway was dedicated subject to existing trees, etc., these will normally remain the property of the owner of the subsoil.

(*d*) 1959 Act, s. 83.

(*e*) Under, *e.g.*, Public Health Act, 1875, s. 161.

(*f*) 1959 Act, s. 84.

(*g*) *Marshall* v. *Blackpool Corporation* [1935] A.C. 16.

(*h*) This would include, presumably, any development permitted under the General Development Order, 1950, which involved the making of an access to an unclassified road. The implied permission conferred by the General Development Order does not authorise any development which involves the formation, laying out or material widening of a means of access to a trunk or classified road: see 1950 Order, First Schedule, Part II, para. 1.

(*i*) The date the Town and Country Planning Act, 1947, came into operation. The means of access in question must not have then contravened the Restriction of Ribbon Development Act, 1935, s. 1 or 2.

(*k*) 1959 Act, s. 86.

(n) Sections 87–97, inclusive, replace the provisions of the Highways (Provision of Cattle-Grids) Act, 1950, except section 6 thereof which deals with traffic signs (see the Twenty-second Schedule to the 1959 Act as to modifications).

(o) The reconstruction and improvement of bridges is provided for in sections 98–101.

(p) Section 102 empowers a highway authority to execute works for the conversion of a maintainable highway into a metalled highway—a power which it might perhaps have been assumed was exercisable without express statutory authority.

(q) Drainage works may be carried out by a highway authority for the purpose "of draining it or of otherwise preventing surface water from flowing on to it" (*l*).

(r) A highway authority may be ordered by the local magistrates (on the application of "any person") to erect a traffic sign on or near a highway giving directions to places served by the highway (*m*).

(s) The highway authority are under a duty to provide posts to indicate the depth of flood water in connection with any highway which is subject to flooding "to any considerable depth," where they consider the provision thereof necessary or desirable (*n*).

(t) The highway authority may treat the highway for mitigating the nuisance of dust (*o*).

These powers are reasonably exhaustive, but, as mentioned above, section 64 (2) confers a general power to carry out improvements, even of a kind not contemplated in one or more of the specific powers.

4. Highway Nuisances

Any obstruction of a highway without express statutory authority is at common law a public nuisance, in respect of which an action will lie at the suit of any person who can show he has suffered special damage (*p*). Many forms of obstruction to the

(*l*) *Ibid.*, s. 102. The purposes for which drainage works may be executed by the highway authority were not stated in the provisions of the Highway Act, 1835, which the present section replaces. Other drainage works would presumably be the responsibility either of the land drainage authority under the Land Drainage Act, 1930, and the River Boards Act, 1948, or the sewerage authority under the Public Health Act, 1936.

(*m*) 1959 Act, s. 104.

(*n*) *Ibid.*, s. 105.

(*o*) *Ibid.*, s. 106.

(*p*) *Benjamin* v. *Storr* (1874) L.R. 9 C.P. 400.

rights of the public to pass and repass on the highway are made offences, punishable summarily (*q*), by Part VIII of the 1959 Act, and in many cases (*r*) prosecutions in respect thereof may be instituted only by the highway or local authority or by a person aggrieved, except with the consent of the Attorney-General (*s*).

The local authority (*t*) are given a general duty by section 116 of the 1959 Act to assert and protect the rights of the public over highways and to prevent encroachments on roadside wastes (*u*).

The rest of Part VII of the Act is taken up with a number of provisions aimed at preventing particular kinds of nuisances on or to a highway. These include:

(a) Direct damage to a highway, including excavating a carriageway, lighting a fire or discharging a firework within fifty feet of the centre of a highway whereby it is damaged (*w*), or damaging a post, cattle-grid or traffic sign, is made an offence by section 117.

(b) The highway authority may make good damage caused to the footway of any street and recover their expenses from the owner of land adjoining, or from the person responsible (*x*).

(c) Section 119 replaces section 56 of the National Parks and Access to the Countryside Act, 1949, regulating the ploughing up of footpaths across agricultural land.

(d) "Wilful obstruction" to the free passage along a highway is made an offence by section 121, replacing provisions of the Highway Act, 1835, and section 122 prohibits the erection of a building or fence, or the planting of a hedge in any highway which consists of or comprises a carriageway.

(e) Section 143 replaces the Barbed Wire Act, 1893, empowering the appropriate authority (which in some cases may be the Minister: see subsection (5)), to take action in cases of nuisance caused by a fence on land adjoining a highway (whether or not it is maintainable at the public expense) made with barbed wire or having barbed wire in or on it.

(*q*) 1959 Act, s. 269.
(*r*) Listed in the Seventeenth Schedule to the 1959 Act.
(*s*) 1959 Act, s. 271. Other offences may be prosecuted in the ordinary way.
(*t*) For some purposes county and county borough councils, and for others, county district councils: see subss. (2) and (3).
(*u*) s. 116 (4).
(*w*) If a user of the highway is injured, an offence is committed against s. 140.
(*x*) s. 118.

(f) Section 155 is probably one the most important of these clauses, in that it makes of general application a power contained in a number of local Acts and appearing in "Model Clauses." This section enables the county council (in a rural district) or the borough or urban district council (*y*) to give notice to the occupier of premises adjoining or having access to a highway maintainable at the public expense, to the effect that they propose to construct a carriage crossing across a grass verge or kerbed footway in the highway to his premises; when the work has been done the authority can recover their reasonable expenses from the owner or occupier of the premises in question. The carriage crossing will thereafter be maintainable by the highway authority, as part of the highway, and not by the landowner at whose expense it was constructed. This section goes considerably further than the former provision in section 18 of the Public Health Acts Amendment Act, 1907 (itself an adoptive Act), as that section merely empowered the local authority to require a frontager to construct any carriage crossing he wished to provide, in accordance with their specification as to method of construction, etc. The present section may be used in any case where the occupier of the premises concerned "habitually takes or permits to be taken a horse or horse-drawn or mechanically-propelled vehicle" (*z*) across the verge or kerbed footway; what may amount to "habitually" in this context may cause difficulty in practice.

(g) Trees in land adjoining the highway are often a cause of difficulty. If they are in the highway itself at the time of dedication it seems they remain the property of the owner of the soil, the highway having been presumed to have been dedicated subject thereto (*a*), but if the trees were planted (or seeded) subsequent to dedication then they will normally be the property of the highway authority (*b*). If a tree or hedge on the land adjoining (*c*) is causing damage to the highway in consequence of the

(*y*) With the consent of the highway authority, in respect of any highway for which they are not themselves the highway authority.

(*z*) Other than a motor-cycle or vehicle the cylinder capacity of which does not exceed 250 cubic centimetres.

(*a*) In such a case there is no express power given to the highway authority to lop or cut down such a tree, but presumably the general maintenance powers of Part IV, or the improvement powers of s. 64 could be invoked.

(*b*) *Stillwell* v. *New Windsor Corporation* [1932] 2 Ch. 155.

(*c*) Being a tree other than one planted "for ornament or for shelter to a building, courtyard or hop ground."

exclusion therefrom of the sun or wind the highway authority may obtain an order from the magistrates requiring the owner or occupier of the land to "cut, prune or plash" the tree or hedge (*d*)—and in the South-West of England (*e*) the highway authority may do the work themselves with the consent of the owner and the occupier (*f*). Overhanging hedges, trees or shrubs, which "endanger or obstruct the passage of vehicles or pedestrians, or obstruct or interfere with the view of drivers of vehicles or the light from a public lamp," may be dealt with by the highway authority serving a notice on the owner or occupier requiring him to lop or cut the offending vegetation within fourteen days (*g*). An appeal against such a notice lies to the magistrates, and if the notice is not complied with the highway authority may act in default and recover their expenses from the person in default (*h*). In the South-West of England (*hh*), the highway authority may do this type of work (or may remove an obstructing bank) with the consent of the owner and occupier of the land (*i*). Where tree roots are allowed to escape from adjoining premises to the damage of the highway it is submitted that the highway authority have sufficient ownership and occupation of the highway to ground an action in nuisance at common law against the owner of the tree in question (*k*).

(h) The carrying out of dangerous operations on a highway has always been treated as a common law nuisance (*l*), although the law is not concerned with trifling obstructions (*m*), and certain examples are made specific offences by the 1959 Act (repeating earlier sections). Thus, section 144 deals with dangerous land adjoining a *street* which is unfenced or inadequately fenced, section 145 deals with

(*d*) Only between the last day of September and the first day of April in any year.

(*e*) *i.e.*, Wilts, Dorset, Somerset, Devon and Cornwall.

(*f*) s. 120 of the 1959 Act, a clause which was not in the Bill as presented.

(*g*) *Ibid.*, s. 134.

(*h*) As the expenses are not made recoverable from the owner of the land they are not a charge upon the land, nor are they registrable in the local land charges register.

(*hh*) *i.e.*, Wilts, Dorset, Somerset, Devon and Cornwall.

(*i*) 1959 Act, s. 134 (5).

(*k*) The common law action for escaping tree roots is fully discussed in *Butler* v. *Standard Telephones* [1940] 1 K.B. 399; and see [1958] J.P.L. 562.

(*l*) See, *e.g.*, *Holliday* v. *National Telephone Co.* [1899] 2 Q.B. 392.

(*m*) *Buck* v. *Briggs Motor Bodies* [1959] 4 C.L. 479, where the defendants were held not liable in respect of an obstruction caused by a gate which was open for a few seconds only (but see s. 132 of the 1959 Act).

dangerous buildings (*n*), and sections 147 and 148 deal with hoardings to be set up during building operations, and requiring hoardings to be securely erected.

The statute, not purporting to be a comprehensive code, does not deal with all the law of nuisance as it affects highways, and much of the common law is unaffected (*o*); a nuisance to a highway may be caused in a variety of ways, including the use that may be made of the adjoining land. The extent to which the highway authority may interfere with the use made of such adjoining land, apart from the law of nuisance, will be discussed in the next article in this series.

(*n*) Replacing (with improvements) s. 75 of the Towns Improvement Clauses Act, 1847.

(*o*) The liability of adjoining owners and occupiers to users of the highway is discussed briefly in an article by the present writer at [1958] J.P.L. 566.

SALE BY THE EXECUTOR OF A TENANT FOR LIFE OF SETTLED LAND

By Sir Lancelot Elphinstone, Barrister-at-Law

It is a conveyancing tradition that a sale by an executor * of the testator's land gives a safe title, the reason being that the executor can convey free from all equities arising under the will, while the purchaser, unless he has express notice to the contrary, must assume that the sale is made for the payment of debts or other purpose of administration. But the question whether this view is tenable when the sale is by the executor of a tenant for life of settled land has not been considered, either judicially or (with one exception) by textbook writers.

In deciding whether the sale should be made by the executor, two questions arise: (1) Is the sale for an authorised purpose? This is important, because if the sale is not authorised the executor will be liable for a breach of trust, even though the sale may be valid in favour of the purchaser, and the executor's solicitor, if he gave negligent advice, will have to indemnify the executor; and (2) Will the purchaser be adequately protected? If the executor has legal power to sell, this question is of no importance. It is only when the executor's power to sell does not exist or is in doubt that question (2) has to be answered, and this should never happen; for an executor should not be advised to sell when his power is in doubt.

Statutory Provisions

If the legal estate is vested in the tenant for life, he holds it as trustee upon the trusts affecting the settled land: Settled Land Act, s. 5 (1) (b). On the death of the tenant for life, the legal estate devolves on his executor: Administration of Estates Act, ss. 1 and 3. If the land remains settled land, probate limited to the settled land will be granted to the trustees of the settlement, while, if the settlement has come to an end, probate without excepting settled land will be granted to the executor appointed by the will. But the nature of the grant does not affect the powers of the executor:

* "Executor" is used throughout to include administrator, and the Acts referred to are the Property Acts of 1925.

Administration of Estates Act, ss. 22 and 55 (1) (xi), and *Re Bridgett and Hayes' Contract* (*a*).

Then, by section 7 (1) of the Settled Land Act, the executor will hold the land on trust to convey it to the next tenant for life, or (by s. 7 (5)) to any person who has become absolutely entitled.

Executor's Power to Raise Death Duties

The executor, however, may raise the amount payable for death duties in respect of the settled land by sale or mortgage in priority to a conveyance under section 7: Finance Act, 1894, s. 9 (5), Law of Property Act, s. 16, and Settled Land Act, s. 8 (5). But the executor may not postpone the conveyance under section 7 if reasonable arrangements have been made for discharge of the duties; or the conveyance may reserve a term of years for indemnifying him against the duties: Administration of Estates Act, s. 36 (9) and (10), and Settled Land Act, s. 8 (6).

On rare occasions, the executor may be required as estate owner to raise money secured on the settled land by an equitable charge, and he can do this by sale or mortgage: Settled Land Act, ss. 8 (7) and 16, and Trustee Act, s. 16.

But whatever may be the purpose for which the money is required, a sale by an executor of more land than was necessary, with the object of raising capital money for an unauthorised purpose or of acceding to a request by the next tenant for life that the land should be sold will be a breach of trust, and the purchaser having notice of the fact will not get a good title: *Re Venn and Furse's Contract* (*b*).

A sole executor can give a valid receipt for the purchase money, only if the sale is for the purposes of administration. Consequently, as a sale for raising death duties is made for giving effect to a statutory obligation, the purchase money must be paid to or by the direction of the trustees of the settlement, being at least two in number: Settled Land Act, ss. 18 (2) (a) and (c), and 94.

Sale for Purposes of Administration

Precedents are to be found for a sale by the executor of a tenant for life of settled land "for purposes of administration," either under his common law power or under the express powers for purposes of administration conferred by the Administration of Estates Act, s. 39. It seems, however, that the executor of a

(*a*) [1928] Ch. 163.
(*b*) [1894] 2 Ch. 101, 113.

tenant for life takes the legal estate in the settled land as *persona designata* and holds it as trustee for the purposes mentioned in the Settled Land Act and for no other purpose. He is, in fact, in the same position as the executor of any other sole trustee who by the Trustee Act, s. 18 (2), may perform the trust, but is not given the powers incident to the office of executor. This view is confirmed by the law in force before 1926. By section 30 of the Conveyancing Act, 1881, on the death of a sole trustee any hereditaments vested in him as trustee devolved on his executor as if the same were a chattel real, and with the like powers to dispose of, or otherwise deal with, the same, and for the purposes of the section the personal representatives of the deceased were deemed in law his heirs and assigns within the meaning of all trusts and powers. The question arose in several cases whether the executor of a sole trustee for sale could execute the trust under section 30. And the answer always was that he could do so only as transferee of the power confided to the heir, and that the executor obtained no additional power of sale under section 30. These cases were considered in *Re Crunden and Meux's Contract* (*c*) by Parker J., who, after reading section 30, said: "I do not think either part of the section confers on the legal personal representatives powers additional to those which the heir would have had."

Indeed, it is self-evident that there is no "purpose of administration" applicable to a trust estate where the testator's beneficial interest ceased on his death, the testator's debts and liabilities being payable exclusively out of the testator's beneficial interests devolving on his executor. This is apparent from the Administration of Estates Act, s. 1 (1), whereby real estate devolves on the executor only if the interest of the testator did not cease on his death, and from section 32 (1) of the same Act, whereby assets for the payment of debts extend only to the testator's beneficial interests. Nor are the death duties payable on the death of the tenant for life in respect of the settled land a liability of the testator's estate.

The above remarks do not apply to the executor of the settlor when the settlement is made by will. His executor takes the testator's beneficial interests as well as the legal estate and has all an executor's powers for purposes of administration. Accordingly, the obligation of the settlor's executor under section 6 of the Settled Land Act to convey the settled land to the tenant for life is expressed to be subject to the executor's powers "for purposes of administration." Contrast this with section 7 whereby the similar obligation of the executor of the tenant for life is expressed to be

(*c*) [1909] 1 Ch. 690.

subject to his "statutory obligations," no mention being made of purposes of administration.

It is, therefore, submitted (with all respect to the contrary opinion in Williams' *Vendor and Purchaser* (4th ed.), Vol. I, p. 291, that the executor of a tenant for life has no power to sell the settled land for purposes of administration, and that a purchaser will not have the protection given on a sale for those purposes. The purchaser will not be concerned to see that the money raised is wanted, or that no more than is wanted is raised: Trustee Act, s. 17. But if from inspection of the probate he has actual notice that no death duties are payable, he will not obtain a good title: *Wise* v. *Whiteburn* (*d*).

Conclusions

It follows that a sale by the executor of a tenant for life can seldom be justified, and it is usually preferable for the sale to be made after assent to the person entitled. Such a sale gives an exceptionally safe title. If the assent is a vesting assent, the purchaser obtains the protection given to a sale by the tenant for life. And if the land was formerly subject to a vesting instrument and the assent does not name the trustees of the settlement, the purchaser will be bound to assume that the assentee was entitled to the land free from the settlement: Settled Land Act, s. 110 (5).

It is only when the settlement was never completed by a vesting instrument that the assent is not conclusive, though it is sufficient evidence of the title of the assentee. The purchaser is not concerned to inquire into the title of the assentee; but if he has actual notice (whether from the assent itself or from the trust instrument) that the assent was irregular, he will not obtain a good title: Administration of Estates Act, s. 36 (7); *Re Duce and Boots Chemists' Contract* (*e*). As a result of that case, conveyancers have been advised not to recite the title of the assentee in an assent, presumably with the object of concealing a possible error from a subsequent purchaser. But surely this advice is unsound. In *Duce's* case the recital had the beneficent effect of preserving the rights of a beneficiary. Why in such a case should the assentee be allowed to profit from his own mistake or the mistake of his adviser? If a mistake has been made, it cannot be right to conceal it behind an artificial curtain to the detriment of an innocent beneficiary. If the assentee obtained a good title, disclosure of the facts can harm no one.

(*d*) [1924] 1 Ch. 460, 470.
(*e*) [1937] Ch. 642.

Re Bridgett and Hayes' Contract

Finally, the only decision in *Re Bridgett and Hayes' Contract* (*f*) was that a conveyance by a general executor to a purchaser will not be avoided by subsequent revocation of the probate, the power of the executor to sell not being in issue. Also, with great respect to Romer J., his view that probate cannot be granted to the trustees of the settlement if a person has become absolutely entitled, is open to doubt; for, by section 3 of the Settled Land Act, land remains settled land so long as any limitation subsists, and the limitation to the person entitled must subsist until it is implemented or merged by conveyance of the legal estate. It is only then that the person entitled becomes the estate owner and may require the trustees to execute a deed of discharge and a purchaser may assume that the land has ceased to be settled land: Settled Land Act, ss. 17 (1) and (3) and 110 (5).

(*f*) [1928] 1 Ch. 163.

"SOCIAL WELFARE"

By D. W. M. Waters, Barrister-at-Law

What do "social welfare activities" in the Miners' Welfare Act, 1952 (*a*), actually include? Is that Act any help in construing "social welfare" in the Rating and Valuation (Miscellaneous Provisions) Act, 1955 (*b*)? And how far do the numerous decisions on the Rating and Valuation Act have any bearing on the meaning of "social welfare" in the Recreational Charities Act, 1958 (*c*)?

Perhaps surprisingly there has been as yet no reported litigation upon either the 1952 Act or the 1958 Act. So that, in attempting to answer these questions, one has to turn to the Rating Act decisions, and to analyse the meaning which the courts have there built up (*d*).

This Act provides in section 8 that, in a manner set out in the section, rating relief shall be accorded to certain hereditaments (*e*). The Act was intended to coincide with the coming into force of the new valuation lists on April 1, 1956, and in view of the substantially increased assessments which were to be found in those lists it became vital to many organisations that they gain the relief under section 8. Litigation therefore was soon in hand to discover what type of organisation came within the limits of the legislative language. That language, so far as it is pertinent to this enquiry, is as follows (*f*):

> "any hereditament occupied for the purposes of an organisation (whether corporate or unincorporate) . . . whose main

---

(*a*) ss. 12 and 16.

(*b*) s. 8 (1) (a). It may have been that the legislature intended a meaning similar to that of the 1952 Act, but the 1955 Act is silent on this point. Language similar to that of the 1955 Act is to be found in the Copyright Act, 1956, s. 12 (7), and the Valuation and Rating (Scotland) Act, 1956, s. 23 (1). The latter Act employs the term in setting out guiding principles for the exercise of a discretionary power. The section takes effect in 1961, and the 1955 Act decisions are clearly intended as the basis for the exercise of the power.

(*c*) s. 1 (1). The Government made it clear during the debates in Parliament that "social welfare" was adopted as a term because it had been judicially interpreted in several recent statutes; February 11, 1958: *Parl. Deb., Official Report*, House of Commons, Vol. 582, col. 322.

(*d*) The courts have consistently avoided definition, preferring to retain the maximum flexibility in the term.

(*e*) The Rating and Valuation Act, 1959, s. 2, postpones the taking effect of notices served under s. 8 of the 1955 Act until March 31, 1963. It is probable that any new legislation concerning s. 8 organisations will not now take effect until that date.

(*f*) s. 8 (1) (a).

objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare."

(a) The Early Cases

The Act received the Assent on July 27, 1955, and in appeals against assessment between that date and the end of 1956 courts of quarter session were interpreting the language of the Act (*g*). Judgment was given in the first High Court case in January, 1957 (*h*). At once it became evident that in its context in the Act " social welfare " necessitated the ingredient of benevolence. Both Goddard C.J. and Lynskey J. in the Divisional Court stressed the fact of context, the Chief Justice by reference to the marginal note and Lynskey J. by reference to the words " are charitable or are otherwise concerned " in section 8 (1) (a). " It rather looks," said Lynskey J., " as if some eleemosynary effect must be given to the words ' social welfare ' " (*i*). His lordship did not enlarge upon this statement, but, since the court was concerned with the National Deposit Friendly Society, it is probable that he merely had in mind the charitable element of benevolence which was missing in any self-regarding activity (*k*). A similar attitude appears to have been taken by Wynn-Parry J. in the case which followed concerning the Theosophical Society. The learned judge there considered that the reasoning which had moved Lord Tucker in *I. R. C.* v. *Baddeley* when discussing " social well-being " was just as " applicable to such a provision as the one [he had] to consider in this case, namely, section 8 (1) (a) " (*l*). However, it was not clear how Wynn-Parry J. thought that reasoning to be applicable. Was it that the pursuit of " social ethics or good citizenship," as Lord Tucker had required (*m*), had also to be discoverable in a social welfare activity? The difficulty was that Lord Tucker was rejecting " social well-being," which did not necessarily have an ethical content, as going beyond charity; Wynn-Parry J. had therefore to be taken as agreeing with the probable meaning of the " eleemosynary effect " of which Lynskey J. had spoken.

If, as is thought, Wynn-Parry J. did require an element of benevolence (either in social welfare itself or in context), he was

(*g*) In retrospect it is interesting to observe how widely learned recorders and magistrates sometimes interpreted " social welfare " during those early months of first impression: see, *e.g.*, *Ideal Benefit Society* v. *Birmingham City Council* (1956) 49 *Rating and Income Tax* 646 (hereafter referred to as R. & I.T.).

(*h*) *National Deposit Friendly Society Trustees* v. *Skegness U. D. C.* [1957] 1 Q.B. 531.

(*i*) *Ibid.*, at p. 539.

(*k*) This was certainly the conclusion drawn by Donovan J. in *Derbyshire Miners' Welfare Committee* v. *Skegness U. D. C.* [1957] 1 W.L.R. 764, at p. 772.

(*l*) *Berry* v. *St. Marylebone B. C.* [1957] 1 W.L.R. 495, at p. 498.

(*m*) [1955] A.C. 572, at p. 613.

clearly speaking of the activities included within "social welfare" itself when he went on to adopt the description, "the provision of benefits or facilities which tend directly to improve the health and condition of life of the class of persons concerned" (*n*). However, such a distinction between benevolence and the nature of qualifying activity was not self-evident; the description could have been regarded as comprehensive in itself.

A number of points arose out of the case of the *Derbyshire Miners' Welfare Committee* (*o*), which was next in sequence. First, benevolence, which was "inherent" (*p*) in the *National Deposit* decision, was present even if the donor was a nationalised industry acting under statutory obligation. Benevolence comprised provision for others, even though it be compulsive provision. Secondly, this case concerned a holiday centre and recreation or pleasure ground, the object of which was "simply to give certain persons a seaside holiday at cost" (*q*). Such an activity was clearly not within the spirit and intendment of the Statute of Elizabeth, but was it within "the advancement of social welfare"? Donovan J. (*r*) turned to the Miners' Welfare Act, 1952, where "some assistance [was] to be derived as to what is meant by 'social welfare' in connexion with the mining industry at least." Section 16 of that Act reads:

> "'social welfare activities' means activities concerned with the maintenance or improvement of the health, social well-being, recreation or conditions of living of—(a) persons employed in or about coal mines or otherwise employed under the Board [and ex-employees without subsequent employment, and the dependents of both groups]" (*s*).

(*n*) [1957] 1 W.L.R. 495, at p. 499.

(*o*) [1957] 1 W.L.R. 764.

(*p*) *Ibid.*, at p. 772. Donovan J. agreed with counsel for the rating authority that Lynskey J. had meant by an "eleemosynary effect" the element of benevolence.

(*q*) *Ibid.*, at p. 771.

(*r*) Goddard C.J. and Hilbery J. agreed with the judgment of Donovan J.

(*s*) s. 16 goes on to say, "and in particular includes activities carried on" as follows in the First Schedule, Pt. II:

> 5. The maintenance and operation of recreation grounds, institutes, clubs or camps, and the encouragement or organisation of sports, games, holidays or other social or cultural activities.
>
> 6. The maintenance and operation of convalescent homes or ambulances, or the assistance of the sick and disabled otherwise than by the provision of such facilities as are mentioned in para. 3 of this Schedule [*i.e.*, the maintenance and operation in or about coal mines of medical treatment centres or other facilities for medical or therapeutic treatment].
>
> 7. The advancement of education or training, other than vocational education or training for the coal mining industry.

It will be seen that, though the Act usefully contrasts "colliery welfare activities" with "social welfare activities," yet the legislative scope of the latter term clearly covers activities which are in themselves already charitable. This is

This description the learned judge found "helpful," and he had no doubt that such an activity as was here in question was within "the advancement of social welfare" (*t*). The third point raised a new issue; what degree of public benefit was required under section 8 (1) (a)? Donovan J. accepted the suggestion of counsel that this was the same as in charity, that is, the public at large or at any rate a substantial part of it, and then went on to say that such a conclusion was implicit in the word "social," which connoted society, or some substantial part of it, as opposed to a few individuals. However, there was "no point" in discussing the charity cases on the subject, and, since the Lords in *Oppenheim* v. *Tobacco Securities Trust Co., Ltd.* (*u*) had left open the question of a nationalised industry, Donovan J. found the present beneficiaries to constitute a sufficiently large and important section of the community "for the present purposes" (*a*).

It was in the light of these cases that West Ham Quarter Sessions came to consider the West Ham Boys' and Amateur Boxing Club (*b*). Counsel for the trustees conceded that the club was not charitable, and argument therefore turned upon the scope of section 8 (1) (a). The learned recorder, it is interesting to note, followed Wynn-Parry J.'s description of "social welfare" *per se* in *Berry's* case, and, with Donovan J., took "eleemosynary effect" to mean benevolence. But it was a natural legacy of the High Court cases to date that the recorder should have found the factor of benevolence and the nature of qualifying activity to be somehow inter-related. "I take it," he said, "[that 'social welfare'] applies at any rate to such enterprises as provide for a sufficiently large class of persons benefits or facilities of the kind mentioned by Wynn-Parry J. That will certainly be so where an eleemosynary element is present either in the origin of the funds or in the manner of their application" (*c*).

---

particularly true of paras. 6 and 7. One could not say this with the same confidence of para. 5, and it is here together with the words of s. 16 quoted in the text that the interest lies.

(*t*) "For my part, to provide holidays in a seaside camp at cost, arrangements being made to provide varied and healthy recreation in the camp so that people do not walk aimlessly up and down the parade and have nothing like the same temptation to spend a great deal of time drinking, and where, in addition, mothers can leave their children properly looked after during the day and thus get some much needed relaxation themselves, all this, to my mind, is clearly the advancement of social welfare," and his lordship did not understand the rating authority to contend to the contrary: [1957] 1 W.L.R. 764, at p. 771. He also found that "or are otherwise concerned" were words clearly enlarging the scope of the relief beyond charity. The argument of rating counsel was that the main object of the organisation was business, though social welfare might incidentally result.

(*u*) [1951] A.C. 297.

(*a*) [1957] 1 W.L.R. 764, at p. 773.

(*b*) (1957) 50 R. & I.T. 413.

(*c*) *Ibid.*, at p. 414. Since the club was open to all boys, youths and young men in West Ham, there was clearly public benefit in the charity sense.

The decision of Danckwerts J. in the *General Nursing Council for England and Wales* v. *St. Marylebone B. C.* (*d*), which followed, is chiefly of importance because it stressed that " social welfare " was not to be regarded as an alternative form of expressing the poverty classification, even though in section 8 (1) (a) it was found in apposition with " religion " and " education." All the same, the learned judge was of the opinion that it certainly included " persons who are sick or otherwise in need of nursing because of their condition," though this object, of course, would have been well within the present interpretation of the poverty class. But in one sense the case marked a backward step in the process of securing a conformity between the Rating and Valuation Act and the Miners' Welfare Act. The " certain special definitions " of the Miners' Welfare Act Danckwerts J. did not find of " much assistance " to him in interpreting the words " concerned with the advancement of social welfare " (*e*), and from this time it was evident that the criticism of " social well-being " in the Lords was still to hold sway despite the fact that that term is used to describe " social welfare " in the Miners' Welfare Act.

It was at this stage that the Court of Appeal gave its first judgment on the meaning of section 8 (1) (a) (*f*). It is a significant judgment because it brings to a close the early cases, and valuable because it summarises many of the points that had been made hitherto. On the other hand, there now appears language which qualifies phraseology used in the lower courts.

For the first time " social welfare " was now considered apart from, as well as together with, the context in which it appears in section 8 (1) (a). The effect of looking at the term itself was that the doubts surrounding Wynn-Parry J.'s judgment in the *Berry* case were cleared up. The familiar passage in Lord Tucker's judgment commenting on " social well-being " was quoted by the Court of Appeal, and, in applying this language, the court came to a definition of " social welfare " which was identical with that earlier adopted by Wynn-Parry J. " Unless, therefore, some restriction can be implied from the context, we should have thought that the provision of benefits which tends directly to improve the health or conditions of life of individuals comes prima facie within the expression ' social welfare ' (*g*). Moreover, it is clear that the court

(*d*) [1957] 1 W.L.R. 941. (*e*) *Ibid.*, at p. 945.

(*f*) *National Deposit Friendly Society Trustees* v. *Skegness U. D. C.* [1957] 2 Q.B. 573. Judgment was given by the Divisional Court in *Oddfellows Manchester Unity Friendly Society* v. *Manchester City Corpn.* [1957] 1 W.L.R. 1059, prior to the three C.A. decisions, discussion of which follows, but the *National Deposit* decision (C.A.) was conclusive.

(*g*) [1957] 2 Q.B. 573, at p. 581.

did not consider that any ethical element lay within the term; "welfare" denoted "a state of being well, whether in the physical, mental or material sense," while "social" meant "the well-being of individuals as members of society" (*h*). It was in this way that Lord Tucker's words were relevant (*i*).

It has been said that in this case the Court of Appeal rejected Lynskey J.'s view that an "eleemosynary effect" had to be given to the words "social welfare." But this is true only to a limited extent. Lynskey J. thought "social welfare" was restricted in meaning by the preceding words "or otherwise" (which imparted the "eleemosynary effect"); the Court of Appeal rejected this interpretation of "or otherwise" (*k*), but also went on to find a restriction particularly in the word "advancement."

At this point the *National Deposit* case in the Court of Appeal becomes less helpful. Lynskey J. had required an element of benevolence. But was this element now to be found in the word "advancement"? The Court of Appeal thought that as a result of this word "social welfare" had to be forwarded "as an end in itself or for its own sake" (*l*), and, since the court held purely self-regarding activity to be in no sense such forwarding, one is left with the conclusion that benevolence was back but with a different verbal origin. And was the same degree of public benefit, as is required in charity, to be found in "social welfare" itself or in its context? Having suggested that the degree was not the same, the Court of Appeal left the matter at that. Nor did the court comment upon whether, in the description of "social welfare" itself, the word "directly" carried any restriction similar to that which the court discovered in the word "advancement" in context.

(b) Three Contemporaneous Court of Appeal Decisions

When, therefore, on November 26, 1957, the Court of Appeal came to give judgment in three section 8 cases, the position was this. "Social welfare" itself had been described, but it had been suggested that this term did not imply an element of benevolence. Such a conclusion was also supported by the wording of the Miners'

(*h*) *Ibid.* In the *General Nursing Council* case Danckwerts J. ([1957] 1 W.L.R. 941, at p. 945) had already come to a similar conclusion on the word "social."

(*i*) It will be noticed that "social welfare" of the Rating and Valuation Act, 1955, was hereby brought into complete conformity with s. 16 of the Miners' Welfare Act, 1952.

(*k*) Counsel ([1957] 2 Q.B. 573, at pp. 581, 582) had argued that in the context, "or otherwise," the objects of "social welfare" were confined to those in which an eleemosynary element is present. The court broadly rejected any application of the *ejusdem generis* rule.

(*l*) *Ibid.*, at p. 583.

Welfare Act between which and the 1955 Act there was now real conformity. There was conflicting opinion whether, in itself or in context, "social welfare" carried the charity level of public benefit. In context the description of "social welfare" was qualified in that, from whatever source, an element of benevolence was introduced. This meant that every main object of an organisation had to have the substantive purpose of benefiting the public or a substantial section of the public through a social welfare activity. The incidental derivation of benefit of any kind by individuals would not derogate from the substantive purpose.

In the three cases now under review (*m*) each of these points was touched upon with varying degrees of advantage. In *Berry* v. *St. Marylebone B. C.* the court added to what it had descriptively said of "welfare" in the *National Deposit* case. Being well, whether in the physical, mental or material sense was not "intended necessarily to exclude the idea of well-being in a spiritual or emotional sense, for example, happiness or ethical behaviour" (*n*). Nevertheless, it is to be noticed that this was not saying that an ethical element was to permeate all activity coming within "social welfare" as an isolated term. Again it was only in the context of section 8 (1) (a) that such a characteristic entered; "if we can add anything to illustrate the limitation which we think should in this context be put upon social welfare, it would be that the phrase involves at any rate the conception of what used to be called 'good works': the notion of things that, as a matter of social obligation, ought to be done for the benefit of those in the community whose living conditions in those respects are inadequate" (*o*).

It had been clear throughout that the courts were most unwilling to shackle themselves with any more precise definition of the activities that came within the term, and in the *Derbyshire Miners' Welfare* case the Court of Appeal simply agreed that such a holiday camp was concerned with "social welfare," merely permitting itself the thought that "some support for this view, although not necessarily conclusive" (*p*), was given by the Miners' Welfare Act. But in the *Berry* case it became equally clear how the courts were thinking. "Social welfare" was a vague term, and it had to be given a limited interpretation since it awarded a relief from payment of rates at the expense of other ratepayers. Moreover,

(*m*) *Berry* v. *St. Marylebone B. C.* [1958] Ch. 406; *Derbyshire Miners' Welfare Committee* v. *Skegness U. D. C.* [1958] 1 Q.B. 298; *General Nursing Council for England and Wales* v. *St. Marylebone B. C.* [1958] Ch. 421.

(*n*) [1958] Ch. 406, at p. 419.

(*o*) [1958] Ch. 421, at p. 436.

(*p*) [1958] 1 Q.B. 298, at p. 308.

" the language of the section itself " (*q*) prevented the conclusion that every non-charitable organisation which benefited the public, or part of it, was to qualify. But, one may ask, presuming benevolence, where was the line to be drawn? The Theosophical Society provided a useful test. Its first object, and the object under dispute, was " to form a nucleus of the Universal Brotherhood of Humanity, without distinction of race, creed, sex, caste or colour " (*r*). In dismissing the society's appeal, the court made two interesting statements. " The society's first object is so wide that many activities lie within it which do not promote the welfare of the community in a social sense at all," and it was also " far removed from any conception of ' social welfare ' that can reasonably or legitimately be entertained " (*s*).

The whole judgment gives the impression that the desire to limit the section is driving the courts back on to a close analogy of existing charitable objects, if not those objects themselves. And it is noticeable that, once the courts have held an activity to qualify, the requirement of " advancement " (which imparted an ethical element in *National Deposit*) is quickly overcome. " The holiday camp by its very existence can be said to ' advance ' social welfare by improving the lot of those persons entitled to take advantage of it " (*t*). It is this sort of remark which makes the relationship of benevolence to the nature of qualifying activity the more difficult to determine.

In this trilogy of cases the question of public benefit arose only with the Derbyshire Miners' Welfare Committee, and there, once again, the court merely stressed that " each case must be decided on its own facts, the question being whether the persons to be benefited form a sufficiently substantial part of the community, measured by common-sense standards, to fulfil the implication of the word ' social ' as used in the section " (*u*).

(*q*) [1958] Ch. 406, at p. 420.

(*r*) Much of the judgment turned upon whether this object tended indirectly to improve the health or conditions of life of society. This will be discussed later.

(*s*) *Supra*, footnote (*q*).

(*t*) Earlier this word had been said to mean " benevolence," *i.e.*, a provision by A for B. It was now interpreted as characterising the nature of social welfare activity: [1958] 1 Q.B. 298, at p. 308, *per* Ormerod L.J. It is perhaps unfortunate that, in later adopting Ormerod L.J.'s words, Lord Simonds [1959] 2 W.L.R. 711, at p. 719, did not discuss the meaning which he attached to " advancement." Particularly might this be so in view of his reference (at p. 718) to the relevance of benevolence and altruism. Where sums are compulsorily levied from the public at large or a substantial section of the public in order that the resultant fund may be expended upon a purpose within the spirit and intendment of the Statute of Elizabeth for the benefit respectively of the public at large or the section, that fund is charitable: *Att.-Gen.* v. *Eastlake* (1853) 11 Hare 205. This appears to be the sole exception to the general requirement of benevolence, *i.e.*, a provision by A for B, though, of course, the exception did not arise in the *Derbyshire* case.

(*u*) [1958] 1 Q.B. 298, at p. 309.

(c) Social Welfare in the Lords

With the picture then by no means complete, the National Deposit Friendly Society provided the first occasion for the Lords consideration of section 8 (1) (a) (*a*). Both Lord MacDermott and Lord Denning considered the scope of "social welfare" itself and the term in its context, and it is with their judgments that the importance of the case lies (*b*).

It is proposed to turn first to "social welfare" out of context, and the question one immediately asks is whether the Court of Appeal description of the term itself survived this appeal. It is more persuasive that the answer is in the affirmative. There is room for debate because Lord MacDermott in an obiter reference confessed to "having some doubt as to whether that conclusion may not go too far," and he hesitated to say that "social welfare" was synonymous with "social well-being." The latter expression, he suggested, might be employed to describe "a state of comfort and plenty" while "social welfare" seemed "to savour, at present anyway, more of those needs of the community which, as a matter of social ethics, ought to be met in the attainment of some acceptable standard" (*c*). Unfortunately his Lordship made no reference to the definition in the Miners' Welfare Act. However, it is suggested that Lord MacDermott was there describing the element of altruism, and, if such an element is conceded to exist, that his Lordship was not questioning the Court of Appeal description as being validly descriptive of qualifying activity. It is of some interest that Lord Denning also thought that the term connotes "the concept of public benefit," meaning an altruistic act, or "doing good for others [being members of the community or part of it] who are in need." Of course, it is true that Lord Denning made no mention of the Court of Appeal description; on the other hand he did adopt language similar to that of the Appeal court in order to describe the nature of qualifying activity. "If a person is engaged in

(*a*) [1958] 3 W.L.R. 172.

(*b*) Lord Keith noted (*ibid.*, at p. 180) that the words of the section covered objects, which "for some reason or other may fail to come under the definition of 'charitable purposes' in the strictly legal sense," and, with the Court of Appeal, found some limitation in meaning in the word "advancement." He contented himself with this, however, and Lords Somervell and Birkett expressed their agreement with his judgment.

(*c*) *Ibid.*, at p. 183. In *I. R. C.* v. *Baddeley* [1955] A.C. 572, Lord Somervell said (at pp. 582, 583) that social well-being means "primarily, in my opinion, a happy or contented state. [It] would be promoted when people were happy together—an important fact in institutional life." And Lord Simonds has more recently said in the *Derbyshire* case [1959] 2 W.L.R. 711, at p. 718, talking of the "impossibility" of defining "social welfare," "but it would be a strange definition which was not wide enough to include what is, under modern conditions, widely regarded as so important to happiness and general well-being as a so-called holiday centre."

improving the conditions of life of others who are so placed as to be in need, he is engaged in 'social welfare'" (*d*), and such conditions, as Danckwerts J. had in fact already pointed out, were not restricted to poverty. Examples that Lord Denning gave of the qualifying activity were these: youth clubs, holidays for people of limited means, and clubs for working men where they can spend their leisure. (*e*).

The difficulty is that two characteristics are intertwined in "social welfare." If individuals concern themselves as a group with improving their own conditions of life, and that concern expresses itself in self-help, then whatever the nature of the improvement upon which they are engaged, it is highly unlikely, even if the group is a needy class, that the courts will regard the self-helping improvement as within "social welfare." However, if the help is for others, or even for the donor and others, provided the recipients are a substantial section of the community, the nature of the improvement intended by the help may be described, it is suggested, as it was by the Court of Appeal.

Secondly, "social welfare" in the context of section 8 (1) (a). Here both their Lordships found the requirement of altruism, that is, the benefit of others, and benevolence, that is, a desire to do good. Lord Denning so construed "otherwise concerned with," thereby re-expressing the earlier view of Lynskey J., and similarly "advancement"; Lord MacDermott found those elements in "advancement" (*f*).

The court was not called upon to discuss the problem of public benefit, but an obiter remark fell from Lord Denning. He felt that the "concept of public benefit" inherent within "social welfare" was to be read in two senses. It implied a need for

(*d*) [1958] 3 W.L.R. 172, at p. 190.

(*e*) With *Working Men's Club and Institute Union, Ltd.* v. *Swansea Corpn.* [1958] 1 W.L.R. 1135, each of these activities has now been successful in the courts.

(*f*) In Lord MacDermott's view the National Deposit Society members were concerned with neither of the characteristics to be found in "advancement," and this was the basis of his decision. Words recently employed by Lord Simonds in the Lords' consideration of the *Derbyshire* case [1959] 2 W.L.R. 711, at p. 718, might suggest that benevolence and altruism are features neither of charity nor of s. 8. However, it is clear that his Lordship was merely saying that, whether moneys are donated or exacted by legislation, the court is solely concerned with the purposes to which those moneys are devoted. It is in determining whether any particular purpose is within the concept of charity or the words of s. 8 that the elements of benevolence and altruism constitute a guide. See further, *supra*, footnote (*t*). Such a viewpoint accords fully with the judgments of the lower courts in this case, and Lord Denning (at p. 722) was content to say that "the provision of this holiday centre . . . fulfils all the criteria laid down by this House in the *National Deposit Friendly Society* case." A similar interpretation of Lord Simonds' language has now been made by Salmon J. in *Waterson* v. *Hendon B. C.* [1959] 2 All E.R. 760.

altruism, and, at least in the context of section 8 (1) (a), the class of persons that was so benefited was "wider, no doubt, than the somewhat limited interpretation put on it in the charity cases." But, having come to this conclusion, his Lordship, like Donovan J. before him, thought there was "no need under this section to canvass the [charity] cases," it was sufficient "to reach a conclusion on a general survey of the circumstances" (*g*).

(d) The Subsequent Decisions

The judgments of Lords MacDermott and Denning have done much to paint in a good deal that was not clear before, and the judgment of Lord Denning in particular was received with acclaim in rating quarters (*h*). But several points remained to be established, and in three subsequent decisions the lower courts have clearly considered that the Lords gave descriptive guidance rather than definition (*i*).

The first point to arise after the *National Deposit* decision was this; what is the relation between the Recreational Charities Act and the 1955 Act? The Recreational Charities Act came into effect on March 13, 1958, and all organisations within the terms of the Act were "deemed always to have been charitable." The Act itself confirmed the charity status of many activities which were rendered uncertain by dicta in the *Baddeley* case, and it was clear that activities which secured the protection of the 1958 Act would also come within section 8 of the 1955 Act. However, when the Divisional Court gave judgment on the rating position of the *Nottingham Mechanics' Institute* in October, 1958 (*k*), the 1958 Act is not reported as having been mentioned. Strangely enough, in construing the object "social improvement," Parker C.J. allied the terms "social improvement" and "social well-being," and then rejected the latter term relying upon the deprecatory words

(*g*) [1958] 3 W.L.R. 172, at p. 189. There has been as yet no reported case where an activity was held to be of the character of "social welfare," and where the class of beneficiaries was not within public benefit in the charity. It seems safer to proceed on the basis that the degree of public benefit in charity and "social welfare" is the same, but that the courts have utilised the language of s. 8 (1) (a) to avoid having to discuss the different distinctions and conflict of the charity cases. This latter conclusion seems confirmed by Lord Simonds' recent reiteration, [1959] 2 W.L.R. 711, at p. 718, that "the court has . . . to forget all the refinements of charity law."

(*h*) At the Rating and Valuation Conference, 1958, one speaker "suggested that 'social welfare' within the context of section 8 . . . had at last been defined by Lord Denning" in the *National Deposit* case: (1958) 51 R. & I.T. 671.

(*i*) In *Oddfellows Friendly Society* v. *Manchester Corpn.* [1958] 1 W.L.R. 1171, at p. 1178, Pearce L.J. reverted to Evershed M.R.'s judgment in the *General Nursing* case in order to illustrate the meaning of "or otherwise for the advancement of social welfare."

(*k*) (1958) 51 R. & I.T. 681.

of Lord Simonds in the *Baddeley* case. Yet, as a result of the 1958 Act, much of Lord Simonds' language is now subject to considerable doubt. Moreover, the Chief Justice thought that "social improvement" was wider than "social welfare." "It comes to my mind," he said, "nearer to what the Court of Appeal considered to be social welfare in [the *National Deposit* case], where they said: 'the provisions of benefits which tends directly to improve the health or conditions of life of individuals,' and Lord MacDermott and Lord Denning both considered that that was too wide" (*l*). Accordingly no social welfare was advanced by the Nottingham Institute (*m*). And the 1958 Act remains as an enigma yet to be solved.

Another point which has arisen later than *National Deposit* in the Lords is the problem of clubs. These organisations possess neither altruism nor benevolence if they are provided by members for themselves. Nevertheless, what is the position if they are founded with "social welfare" objects by one or several persons for the benefit of others, but over the years have tended to become supported by members' subscriptions and to provide in the main only the ordinary recreational club facilities (*n*)? This appears to have been the real difficulty with the Nottingham Institute. The objects at the 1837 foundation were "the improvement of members and the promotion of education"; it would therefore seem that the issue ought to have been to discover whether the Institute was totally altruistic in its conception, and whether that altruism, if any, survived the trustees' incorporation with wider objects in 1912. The problem was almost identical with the *Working Men's Club and Institute Union, Ltd.*, judgment concerning which was given by the same court a few days later (*o*). The Union won

(*l*) *Ibid.*, at p. 684. The writer will have been seen, with respect, to disagree with this conclusion, but it may now be wise to turn solely to Lord Denning's judgment for guidance upon those activities which are within "social welfare."

(*m*) Lord Parker also accepted (and this should now be considered in theory to be beyond question) that "a smaller class might qualify an institution to benefit under the head of 'advancement of social welfare' than as a strict charity" (*ibid.*). In the present case the court found that the class was restricted to members and "other selected persons or other classes of persons," and that this was evidently too small.

(*n*) The problem is particularly difficult under s. 8 because *Berry* v. *St. Marylebone B. C.* (C.A.) decided that main objects are normally to be deduced from the written constitution. Current activities may only be looked at in the event of ambiguity in that document. In an *obiter* remark in *National Deposit* Lord Denning said ([1958] 3 W.L.R. 172, at p. 188) that not only "the rules" of an organisation should be looked at, but also "the way in which it has conducted its affairs." This method of construction has not been taken up by the lower courts, which have continued to quote *Berry's* case as authority. See, *e.g.*, *North of England Zoological Society* v. *Chester R. D. C.* [1959] 1 W.L.R. 773.

(*o*) [1958] 1 W.L.R. 1135.

its case, however, on the grounds that the Union, as opposed to its member clubs, still retained its original altruistic basis, though it was now self-supporting and drew some finance from its members. Would the result have been different if it had not been one feature of the altruism of the nineteenth century foundation that working class men should be encouraged to help themselves through their own efforts? The answer appears to be in the affirmative (*p*).

With respect, however, it does seem regrettable that at this stage the High Court should adopt these words of quarter sessions as the basis of judgment: "whilst the institution provides its members with most admirable facilities for education and for social welfare of the best and most suitable type for the class of persons who join it (*e.g.*, there is no gaming nor any consumption of alcohol on the premises) nevertheless in this context its main objects were indistinguishable from those of many social clubs" (*q*). The distinction between included and excluded clubs is very fine indeed. As the law stands a minute examination of the written objects is inevitable, and it is evident that the greater the proportion of self-regard the more hostile will the courts be to the argument of qualifying activity. In the present state of the authorities, greater precision is impossible (*r*).

The Purposes of a Qualifying Organisation

Presuming, however, that "social welfare" in itself or in the context of section 8 implies a fairly-well understood scope of qualifying activities, an element of altruism and benevolence, and a measure of public benefit a little less broad than with charity, much will yet turn upon the construction of the purposes of an organisation. And, if the purpose, once discovered, does not immediately provide some "social welfare" facility for a sufficient section of the community, may it through its immediate form have the indirect purpose (the true purpose, as it were) of providing such a facility for public benefit?

This problem, turning largely on the niceties of language, has caused the courts considerable difficulty. *National Deposit* in the Lords was silent on the subject, and the matter came to a head in the recent three to two division of the Lords in the case of the *General Nursing Council for England and Wales* (*s*).

(*p*) See in particular Lord Parker's judgment, *ibid.*, at p. 1145.
(*q*) *Per* Streatfeild J. ((1958) 51 R. & I.T. 681, at p. 685) in the case of the *Nottingham Mechanics Institute.*
(*r*) In drafting objects the use of saving words (as demonstrated in examples at the end of this article) may be of service.
(*s*) [1959] 2 W.L.R. 308.

It is necessary to go back a little on this, and from the first the desire to prevent every organisation from qualifying whose work rendered benefit to the public, but yet to recognise the " genuine " indirect purpose, has bedevilled language. In the case of the *Theosophical Society* Wynn-Parry J. thought that one must be able to " discover in the operation of the undertaking some direct impact on the proposed beneficiary," and this no doubt inspired his description of " social welfare " as " facilities which tend directly to improve." He also gave an example of what he had in mind; " a social centre established in Liverpool with a view to encouraging better relations among the various races which are to be found from time to time in that great port " (*t*). Undoubtedly this seemed to rule out the main object or purpose which only indirectly tended to improve health or conditions of life. But in dealing with the General Nursing Council Danckwerts J. came to a different conclusion. The words " concerned with " in section 8 meant that it was " not essential that [the organisation] should be formed ostensibly for the purpose of advancing social welfare "; it was sufficient if it was " formed with objects the result of which is the advancement of social welfare " (*u*). The learned judge clearly recognised where this was likely to lead, but he found the language of the section unambiguous. Having therefore construed the purpose of the Council (*a*) to be the creation of " a system of registration so as to prevent incompetent nurses being able to victimise the public, and for making sure that the public should receive the services only of competent nurses," his lordship went on to say: " That seems to me to be the establishment of a body for the purpose of benefiting the public, and, therefore, for a purpose, as it seems to me, of social welfare " (*b*).

However, this latter interpretation not only permitted indirect purposes to come within the section, it equated " social welfare " with any benefit to the public of whatever kind. So that a conflict of opinion appeared to exist when, in describing the scope of social welfare activities in the *National Deposit* case, the Court of Appeal took up Wynn-Parry J.'s phraseology; " the provision of benefits which tends directly to improve " appeared to argue against the purpose with an indirect benefit to society. The court also said that, though " concerned " was " a wide word, we do not think that it can be read as bringing in as an object something which is incidental " (*c*). But, since this last reflection was instigated by

(*t*) [1957] 1 W.L.R. 495, at pp. 498, 499.
(*u*) [1958] 1 W.L.R. 941, at p. 945.
(*a*) A construction of the Nurses Act, 1957, which set up the Council.
(*b*) [1957] 1 W.L.R. 941, at pp. 946, 947. (*c*) [1957] 2 Q.B. 573, at p. 583.

consideration of a case (*d*) where the issue had been whether the Institution of Civil Engineers was promoting the science of engineering and, as an incidental ("a necessary consequence") (*e*), raising the standard of the profession, the court by these words merely appeared to be saying that only main objects, like substantive purposes in charity, were relevant for consideration. No comment was made upon Danckwerts J.'s view that "concerned" let in indirect purposes.

On the other hand, in charity cases a purpose may be charitable even if charity is only indirectly produced, and such cases are valid despite others which reject a purpose of two aspects only if the non-charitable is the primary as opposed to the incidental. It was evidently this fact which actuated the Court of Appeal in *Berry's* case to say in an obiter dictum that some of the argument before that court had taken "a somewhat too rigid approach" to the *National Deposit* judgment. And, in demonstrating that the words "tends directly to improve" did not exclude "the provision of benefits, which tended indirectly to produce those results" (*f*), the court gave as an example an organisation which was concerned with the free training of girls who desired to take up nursing or midwifery as a profession, notwithstanding that there was no direct benefit to society during their period of training. Though this reminder was valuable, it might, with respect, have been more valuable to compare these two types of charity cases.

When the *General Nursing Council* case reached the Court of Appeal an opportunity arose for the court to consider indirect purposes. The Master of the Rolls (for the court) stated "the purposes and functions" (*g*) of the Council to be (1) the maintenance of a register of nurses and roll of assistant nurses, and (2) the regulation of admission to and removal from those documents by the supervision and direction of the training and examination of nurses. Later his Lordship said, "The results were and were intended to be, on the one hand, the enhancement of the qualities and status of nurses and, on the other, the benefit and protection of the public, particularly of the sick" (*h*). These results were the purposes of the Council within the meaning of charitable purposes, and it was not possible to say that the former was ancillary to the latter. The Council was therefore not charitable. Was it "concerned with the advancement of social welfare"? The main

(*d*) *Commissioners of I. R.* v. *Forrest* (1890) 15 App.Cas. 334.
(*e*) *Ibid.*, at p. 354.
(*f*) [1958] Ch. 406, at p. 419.
(*g*) [1958] Ch. 421, at p. 429.
(*h*) *Ibid.*, at p. 432.

objects and the purposes being identical, everything turned on the former object. It was not sufficient that a main object was "in some degree related to" the advancement of such welfare, it must "in a real sense be directed" to such advancement (*i*). This proposition implied that the meaning of "social welfare" was crucial, and, the court having held that social welfare and public benefit were not coterminous and that all nursing was not describable as social welfare work, the appeal was lost.

This is an interesting judgment, because, though the result was upheld in the Lords, the majority of the Lords came to a quite different conclusion upon what were the purposes or main objects of the Council. Their Lordships did not look to the results of the functions of the Council, but took those functions themselves (*k*) as being the purposes or objects. Lord Keith was most adamant upon the reasons for this: "It is by the language used that Parliament has expressed its intention and it is with the objects for which the council was immediately and directly constituted that we are, in my opinion, concerned, and not with the result of its activities at second or third hand" (*l*). "We are not concerned with indirect consequences nor entitled to speculate on what ultimate purposes, if any, Parliament had in view" (*m*). Lord Cohen and Lord Somervell, in separate dissenting opinions, both accepted the purposes as they were found by the Court of Appeal, though Lord Somervell worded the second of these as being the promotion and improvement of the art and practice of nursing (*n*).

The position today

The present state of the law is therefore not a happy one, but the position seems to be this. From all appearance substantive and ancillary purposes, and main and incidental objects, have the same meaning (*o*). It follows that neither ancillary nor incidental

(*i*) *Ibid.*, at p. 434. Earlier (at p. 433) Lord Evershed had agreed with counsel that "it is not sufficient if the main objects are somehow or other related to, in some sense connected or 'mixed up with,' the advancement of social welfare." They must be "directed" to such advancement.

(*k*) (1) and (2) as described *supra* in the text.

(*l*) [1959] 2 W.L.R. 308, at p. 318.

(*m*) *Ibid.*, at p. 320.

(*n*) Lords Morton, Tucker and Keith dismissed the Council, both under charity and under social welfare, because the purposes were not directly concerned with either. Lord Cohen accepted that the Council was not charitable, and Lord Somervell expressed no opinion, but both agreed that the primary of the two main objects (!) was the second as found by the Court of Appeal.

(*o*) "We omit for this purpose reference to 'main objects,' since this may well merely differentiate the test from cases where the word 'exclusively' is used, *cf.* Scientific Societies Act, 1843": *per* Parker L.J. in the *National Deposit Case* [1957] 2 Q.B. 573, at p. 582. "'Main objects'—which I take to mean all of its main objects as distinct from its subsidiary objects": Lord Denning in the *National Deposit* case [1958] 3 W.L.R. 172, at p. 188.

objects, whether they be within or without the statutory purposes of section 8 (1) (a), are relevant to an inquiry whether an organisation qualifies under that paragraph. An organisation will be charitable if it directly promotes charitable work, that is, if its substantive purpose or purposes solely and directly promote a charitable activity in favour of a sufficient section of the public. In the same way an organisation will be concerned with the advancement of social welfare. Equally an organisation will be charitable or concerned with the advancement of social welfare if its substantive purposes or main objects solely and indirectly promote charitable or social welfare activities respectively. But a purpose (including object) which directly promotes and a purpose which indirectly promotes may each be of two aspects, that is, one aspect charitable or concerned with the advancement of social welfare, and the other not. In the case of each purpose, however, it is a matter of construction to determine which of the two aspects is the primary, and which the necessary consequence of the other. Only when the allegedly charitable or social welfare aspect is the primary does it become relevant whether that purpose does in fact directly or indirectly promote charity or social welfare.

However, the number of purposes which indirectly promote a charitable activity are limited, the reason being that the remoteness of the immediate activity from charitable activity suggests to the courts only a "vagueness" of connection (*p*). A good example of a valid purpose is the free training of girls who desire to take up nursing or midwifery as a profession. As Lord Keith pointed out in *General Nursing Council* (*q*), the charitable purpose here is the nursing of the sick poor, which soon came to embrace the nursing of the sick. The training of nurses, therefore, is a purpose which indirectly promotes charity by providing better nurses for the sick. But why has this particular activity been singled out from all other professional training schemes as having a solely and indirectly charitable purpose? The cases suggest an intermingling of two types of charitable purpose; the advancement of education, and the nursing of the sick. Provided a specialised field of learning is pursued with the primary object of merely furthering knowledge in that field, the fact of specialisation will not derogate from its charitableness. And this is so despite the fact that as a consequence the

(*p*) "Some confusion has arisen from the fact that a trust of general public utility, however general and however public, cannot be of equal utility to all and may be of immediate utility to few": *per* Lord Simonds in *I. R. C.* v. *Baddeley* [1955] A.C. 572, at p. 590. His Lordship gave as an example of indirect benefit a home for some sort of child welfare. "Indirect benefit is certainly an aspect which must have influenced the decision of the 'cruelty to animal' cases": *ibid.*

(*q*) [1959] 2 W.L.R. 308, at p. 320.

status of practitioners in that field is enhanced. The study and practice of the art and science of surgery directly advances education, and indirectly it advances the nursing of the sick (*r*). "To promote the science and art of nursing and the better education and training of nurses and their efficiency in the profession of nursing" was conceded to be a charitable purpose in *Royal College of Nursing* v. *St. Marylebone B. C.* (*s*), and here there is a stronger flavour of intermingling. The object directly advances education, and to the extent to which there is any doubt it also promotes the skill of nursing and thereby indirectly advances the nursing of the sick (*t*).

Nevertheless, though there are examples of purposes which have been held indirectly to advance charitable activity, can there be an indirect advancement of social welfare activities? In *Berry's* case the Court of Appeal said yes, but unfortunately the example the court gave was the free training of girls in nursing, and this purpose is indirectly charitable. The question then remains; what about the provision of a holiday camp, a youth club, or a club for working men? Must those facilities be provided for the public at large (including a substantial section of the public)? Or may social welfare be indirectly advanced, that is by the activity, through its very nature, being for the indirect purpose of benefiting the public at large, though individuals alone derive immediate benefit? After the Lords decision in *General Nursing Council* and the evident attempt to restrict the scope of social welfare, the answer would appear to be that the facilities must be available directly to a sufficient section of the public. All the same, genuine doubt surrounds this type of object; the free training of adult persons in youth club leadership. Undoubtedly the analogy of the charity cases is going to be all important, and that analogy would probably constitute precedent for this object. But it must be remembered that the courts have a clear idea of the sort of purpose which is charitable; social welfare is still a new and vague concept. This may well mean that the courts will hesitate to recognise purposes which are alleged indirectly to promote a social welfare activity, but which do not already indirectly promote a charitable activity.

(*r*) It was probably with the direct purpose in mind that Lord Keith in *General Nursing Council* (*ibid.*) spoke of the training of nurses as being unlike the case of the *Royal College of Surgeons of England* ([1952] A.C. 631) where the object at issue was the study and practice of the art and science of surgery.

(*s*) [1958] 1 W.L.R. 95, at p. 97.

(*t*) In fact the strands of the various charitable purposes were interwoven even before the *Pemsel Case* [1891] A.C. 531, and such is the variety of purposes which come within Lord Macnaghten's fourth head that often whether an organisation's purpose is direct or indirect depends upon the court's description of the particular charitable object.

Social Welfare in the Recreational Charities Act, 1958

It might be considered unfortunate that in the 1958 Act the legislature adopted "social welfare" to describe a group of trusts "deemed always to have been charitable," when all the litigation upon that term had been concerned with the 1955 Act where the words "charitable or are otherwise concerned with" apposed charity and social welfare. This apposition has undoubtedly taken "social welfare" activity beyond the spirit and intendment of the Statute of Elizabeth (*u*), and the term has already come to include a holiday camp for miners and their families, a boxing club for boys and young men in a London suburb, and the organising headquarters of a working men's club movement. The first and third of these activities were held not to be charitable, and the second conceded not to be so (*a*).

It is because of this apposition that the courts' discussion of "social welfare" out of context is now of considerable importance. And, indeed, Lord Denning's discussion of "social welfare" *per se* in the *National Deposit* case appears to have in mind section 1 of the 1958 Act (*b*). It will also be remembered that it was in this case that the point was made for the first time and by the Lords that "social welfare" *per se* implies an element of benevolence and altruism.

In the context of the 1958 Act, however, "social welfare" is defined with two points in mind: the nature of the qualifying facility, and the nature of the benefited class. The nature of the facility is defined in a manner which is close to the Court of Appeal description, and almost identical with the phraseology used by Lord Denning: "the facilities [must be] provided with the object of improving the conditions of life for the persons for whom the facilities are primarily intended" (*c*). Several points arise here.

(*u*) In the *General Nursing Council* case (H.L.) Lord Cohen said ([1959] 2 W.L.R. 308, at p. 317): "It is not easy to define exactly the meaning of social welfare, but I am prepared to agree with [counsel] that social welfare includes the relief of persons or classes of persons who, by reason of their circumstances, are in special need of relief of a kind analagous to that contemplated by the statute of Elizabeth." A finding of "inclusion" was sufficient for the case.

(*a*) The Divisional Court held that the Derbyshire miners' holiday centre was not within the spirit and intendment of the Statute of Elizabeth; the Court of Appeal and the House of Lords merely considered whether such an activity came within social welfare. But it is not without interest that the legislature has now brought the "social welfare activities" of the Miners' Welfare Act, 1952 (including thereby the term "social well-being") within the confines of charity: see s. 2 of the 1958 Act. At no level of the *Derbyshire* case was the effect of the 1958 Act considered.

(*b*) [1958] 3 W.L.R. 172, at p. 190.

(*c*) s. 1 (2) (a). On the analogy of the word "directly," earlier discussed, with "primarily," this language would include the purpose which has the indirect effect of improving the conditions of life of the public at large, or a sufficient section of the public, *e.g.*, the training of youth club leaders.

First, even keeping in mind that the Act is only concerned with trusts providing facilities for "recreation or other leisure-time occupation" (*d*), the statutory definition appears to include all those activities that have qualified under "social welfare" in the 1955 Act. And, moreover, one calls to mind Lord Denning's comment, "These words [*i.e.*, 'social welfare'] comprehend many objects which are beneficial to the community but are not charitable according to the somewhat limited interpretation given in the charity cases" (*e*). Apart from the proviso that the charity notion of public benefit is to apply (which seems irrelevant in this connection), there is nothing in the Act to suggest that Lord Denning's words would not also be applicable to section 1 (2) (a) (*f*).

Secondly, the Court of Appeal and Lord MacDermott were both of the opinion (*g*) that "to improve the health and conditions of life" did not necessarily contain a notion of ethical standard. And Lord Denning stressed the necessity of improving the conditions of life of "others who are . . . in need" (*h*). It is evident, then, as with the interpretation of the 1955 Act, that whether any particular facility qualifies under section 1 (2) (a) will largely depend upon the particular needs of the benefited class. Moreover, "improving the conditions of life" has been shown to be merely descriptive of activity (or facility), so that the necessary element of benevolence and altruism must now be found in the nature of the need and the class (*i*). But, if the source of that element is

(*d*) s. 1 (1).

(*e*) *Supra*, footnote (*b*).

(*f*) The words "deemed always to have been charitable" might be argued as limiting s. 1 (2) (a) to activities which are within the spirit and intendment of the Statute of Elizabeth, but to the present writer this is not convincing. The preamble does not suggest any such limitation, and (see footnote (*a*), *supra*), in view of the courts' remarks between 1952 and 1958 on the 1952 Act meaning, s. 2 must widen the field of charity.

(*g*) In the *National Deposit* case.

(*h*) *Supra*, footnote (*b*).

(*i*) The present writer would be emphatic about this, but it may be thought after *Re Cole* [1958] Ch. 877, that there is some doubt. "It is quite true that the illustrations or examples which are given in the preamble to the Act of 1601 are not exhaustive, and a gift will be valid if it comes within the spirit and intendment of the statute. . . . Nevertheless, I cannot regard the provision of television sets, etc., for the benefit of such persons as juvenile delinquents and refractory children in [a home] as coming within any conception of charity which is to be found in the preamble. If it were, then I suppose a gift to provide the inmates of a Borstal Institution with amenities would be charitable, which would appear to me to be an impossible contention": *per* Romer L.J. at p. 888. Ormerod L.J. also thought that a gift for the "welfare and benefit" of the inmates of a children's home would not be charitable in view of the "many ways" in which the money could be spent; at p. 890. However, it will be observed that the significance of the facility changes according to the need of the beneficiaries. A gift to provide television in a Borstal is one thing, in a school is another. To provide that facility in an old people's home is a stronger case than to provide it in a youth club. If, as is thought, "improving the conditions of life" (s. 1 (2) (a)) is not tied to the Statute of Elizabeth, then in each of these cases the court will have to assess the need of the specified class.

section 1 (2) (b) (i) (*k*), it becomes more difficult to discover the meaning of paragraph (a) when the class of beneficiaries qualifies under the alternative sub-paragraph (ii) (*l*). Does this mean that all women's clubs are thereby declared charitable? A guide in answering this question is to be found in subsection (3) where, " subject to the said requirement," that is, the social welfare definition, women's institutes are specifically referred to as included within that definition (*m*). However, the objects of the Women's Institute movement are largely tautologous of the statutory language: " (1) To improve and develop conditions of rural life, and (2) To give all countrywomen the opportunity of working together through the Women's Institute organisation, and of putting into practice those ideals for which it stands [*i.e.*, fellowship, truth, tolerance and justice] " (*n*). But, in so far as " Women's Institute organisation " is lacking in clarity, current activities may be looked to, and these appear from *The Handbook* to comprise educational instruction of both a formal and an informal nature in a wide range of practical and more academic subjects. *In toto*, therefore, these objects suggest a pursuit of educational or ethical standards, so that the answer to the question earlier posed may well lie in the negative (*o*).

The difficulties that surround women's organisations also extend to facilities which improve the conditions of life of, and are available to, the members of the public at large. Does sub-paragraph (ii)

(*k*) " Those persons have need of such facilities as aforesaid by reason of their youth, age, infirmity or disablement, poverty or social and economic circumstances; or . . ."

(*l*) " The facilities are to be available to the members or female members of the public at large."

(*m*) Subs. (3) refers to " the provision of facilities at village halls, community centres and women's institutes." This could refer solely to those hereditaments (and activities therein) which are held on trust for women's institutes. Some institutes are so provided for; others hire the use of premises. But subsection (3) surely refers to the entire movement.

(*n*) See *W.I.: The Handbook, 1958–1959*, at p. 91. The very similar urban movement of townswomen's guilds, which the Act must also have intended to include, has objects which are clearly educational. " (1) To encourage the education of women to enable them as good citizens to make their best contribution towards the common good. (2) To serve as a common meeting ground for women irrespective of creed or party, for their wider education including social activities ": see *Handbook for Townswomen's Guilds and Federations* (1956), at p. 3.

(*o*) Though, as the writer understands, much administrative work in the W.I. movement is voluntarily performed, and in the past grants have been received from other bodies, the movement is in fact self-supporting. This may well remove the element of altruism and benevolence, and make the movement basically self-regarding. For this reason also in this connection the meaning of para. (a) is vital. The reconciliation of such a self-regard with the public benefit proviso of s. 1 (1) can only be tortuous. So that in framing its objects any future women's organisation concerned with recreation or leisure-time occupation would be well advised to observe the exact language of para. (a) and the objects of the W.I. movement.

in this respect also include self-regarding activity? If the public at large (*p*) were invited to subscribe to a fund which was then expended on the erection of a holiday camp, the intention being to provide holidays at cost for subscribers, would that provision of facilities be within the Act? At the moment it seems safer to conclude that altruism and benevolence are here required; certainly in subsection 3 there is no specific reference to a facility which would come within this classification, and which is also a self-regarding provision (*q*). It would also be wise to assume that, in interpreting "improving the conditions of life," and without the guidance of need, the courts will remain very close to the existing list of charitable objects.

Provision for Specific Sports

Since the decision of the Court of Appeal in *Re Nottage* (*r*) it has been well understood that a gift for "a mere sport or game" (*s*) is not charitable. "Now, I should say," said Lindley L.J., "that every healthy sport is good for the nation—cricket, football, fencing, yachting, or any other healthy exercise and recreation; but if it had been the idea of lawyers that a gift for the encouragement of such exercises is therefore charitable, we should have heard of it before now" (*t*). This also means that no association or club is charitable, even if its object is not to encourage and promote one particular sport but all forms of athletic sports (*u*). A gift to promote a sport is only charitable if the recipient is already engaged in charitable activity, and the sport can be regarded as an ancillary purpose to the main charitable activity (*a*). If, however, a "mere"

(*p*) *i.e.*, without reference to a descriptive class or localised area.

(*q*) In view of the nature of women's institutes, it would be possible to argue that a club is included which has "improving" objects and is open to the public at large, though the facilities are only available to those who take out membership, and the members are self-supporting and self-regarding. Even a right of selection does not automatically exclude the status of charity, and public benefit may be satisfied in availability to the public at large. But, except where it is clearly excluded, the courts may continue to find altruism to be inherent within the term "social welfare."

(*r*) [1895] 2 Ch. 649.

(*s*) *Ibid.*, at p. 656, *per* Lopes L.J.

(*t*) *Ibid.*, at p. 655.

(*u*) *I. R. C.* v. *Commissioners of Glasgow Police Association* [1953] A.C. 380.

(*a*) Education: *Re Mariette* [1915] 2 Ch. 284; *Kearins* v. *Kearins* [1957] S.R. (N.S.W.) 286. "For the setting out of soldiers": *Re Stephens* (1892) 8 T.L.R. 792; *Re Gray* [1925] Ch. 362. The improvement of efficiency in a police force: *I. R. C.* v. *Glasgow Police* (though the particular police athletic association failed in this case). It has been said (Hanbury, *Modern Equity*, 7th ed. (1957), at p. 186) that in view of this last case *Re Mariette* may now be bad law. However, in *Kearins* v. *Kearins*, after the police case, McLelland J. followed *Re Mariette*. The preamble purpose, "the supportation, aid and help of young tradesmen, handicraftsmen and persons decayed," does not include young professional cricketers, to whose Nursery Fund of a County Cricket Club a gift is made: *Re Patten* [1929] 2 Ch. 276.

sporting activity is among others a main purpose or object of an organisation, the organisation will not be charitable. There has been no decision as to whether such an activity is included within "social welfare" in the 1955 Act, since the legislature left nothing to chance, specifically including playing fields in the rating relief of section 8 (*b*).

The nearest the courts have come to the recognition of sporting activities is in the gift of land for use as a recreation ground by the community at large or by the inhabitants of a particular geographical area (*c*). Such a gift is charitable, though in the *Baddeley* case Lord Simonds reserved his opinion whether this would be so where the beneficiaries were determined, for instance, by adherence to a particular religion or by employment in a particular industry or by particular employers. There is no reported case on the charitableness of a gift comprising, for example, a football or cricket ground for the public at large or the public within an area.

What is now the effect of the 1958 Act? The first thing to notice is that in the *Baddeley* case, Lord Simonds, speaking of the poverty class, said, "relief connotes need of some sort, either need for a home or for the means to provide for some necessity or quasi-necessity, and not merely an amusement, however healthy" (*d*). It would seem that this distinction is also important when one is considering section 1 (2) (b) (i) of the Act, because this sub-paragraph is solely concerned with persons who "have need of" facilities by reason of specified disadvantages. "Mere sport" is not made charitable by paragraph (a) and sub-paragraph (b) (i); again the court will have to assess the need of the particular class in relation to the particular gift (*e*). It is the class, and not the sport that determines the charitableness of the gift. A good example of this was the amateur boxing club whose membership was open to

(*b*) s. 8 (1) (c): "any hereditament consisting of a playing field (that is to say, land used mainly or exclusively for the purposes of open-air games or of open-air athletic sports) occupied for the purposes of a club, society or other organisation which is not established or conducted for profit and does not (except on special occasions) make any charge for the admission of spectators to the playing field."

(*c*) The Mortmain and Charitable Uses Act, 1888, s. 6, "seems to me necessarily to involve that in the view of the legislature dedication of land to the recreation of the public is dedication to a charitable use," and therefore within the Elizabethan preamble: *per* Clauson J. in *Re Hadden* [1932] 1 Ch. 133; agreed with by Lord Simonds ([1955] A.C. 572, at p. 589) and Lord Somervell (*ibid.*, at p. 616) in *I. R. C.* v. *Baddeley*; followed by Harman J. in *Re Morgan* [1955] 1 W.L.R. 738.

(*d*) [1955] A.C. 572, at p. 585.

(*e*) *e.g.*, youth: any out-door (or in-door) sport to be organised within a youth club with the purpose of developing body and mind. Age, infirmity or disablement: croquet within a home. Poverty: as for youth. Social and economic circumstances: any out-door sport within a holiday camp for miners, football for a working men's club.

all boys and men in West Ham. The learned recorder found that the area was predominantly working class, and that the large majority of the members were under twenty-six years of age (*f*).

Sub-paragraph (ii) is again difficult to interpret. There is nothing to suggest how "improving the conditions of life" can be limited, or, indeed, will be limited. Subsection 3 specifies "the provision and maintenance of grounds and buildings to be used for purposes of recreation or leisure-time occupation" as being within subsection 2, but this carries the problem of particular sports no further forward. Would then a gift be valid which expressed the desire to encourage and promote the playing of women's stoolball? Would, for example, a women's stoolball club be charitable within the Act? If women are a needy class by reason of their lesser economic advantage (a possible deduction from the absence in the sub-paragraph of males) (*g*) both these questions may be answered in the affirmative. Otherwise both gift and club probably constitute "mere sport."

Finally, the provision of facilities aimed to secure an improvement in the conditions of life of, and available to, the public at large (*h*). It was earlier suggested that in this connection the courts are likely to remain close to, if not actually within, the spirit and intendment of the Statute of Elizabeth. And, though the courts have recognised that a sport or game is beneficial to the community (*i*), Lord Morton was explicit in *I. R. C.* v. *Commissioners of Glasgow Police Association* that "to encourage and promote all forms of athletic sports and general pastimes" was "far indeed" (*k*) from that spirit and intendment, an opinion with which the rest of their Lordships appeared to be in agreement. If such an object is far removed, the more so must be a specific sport. There is also

(*f*) *Trustees of West Ham Boys' and Amateur Boxing Club* v. *West Ham B. C.* (1957) 50 R. & I.T. 413. The club was largely maintained by an annual subscription dinner at the Savoy, donations and profits on tournaments. Boys under 15 years, who comprised 60 to 65 per cent. of the members, paid a very small individual subscription. The learned recorder also found as a fact that other physical sports were growing up within the club, though he did not attach vital significance to this.

(*g*) Of course, this deduction would argue in favour of the charitable status of all purely female activities.

(*h*) Strangely enough, sub-para. (ii) omits reference to the particular geographical area. Trusts which are simply for the public, all reference to objects being absent and the courts therefore implying charitable objects, include both the public at large and the inhabitants of a geographical area: *Williams' Trustees* v. *I. R. C.* [1947] A.C. 447, at p. 459. The implication is that sub-para. (ii) is not referring to this type of trust, and that also in this connection a real and limited meaning attaches to para. (a). But, even if the public at large is to be taken to include the public of an area, the result may well be the same—the courts will remain close to the Elizabethan preamble in interpreting para. (a), and find "no point" in discussing the difficult distinctions on this subject in the charity cases.

(*i*) *Re Nottage* [1895] 2 Ch. 649, at p. 656, *per* Lopes L.J.

(*k*) [1953] A.C. 380, at p. 400.

the point that, were the courts to continue to find a notion of ethical standard within the term "social welfare" (*l*), this would make relevant the necessity-amusement distinction. In this way a specific sport would not be included within "improving the conditions of life" of the public at large.

It would therefore be advisable not to proceed on the assured basis that a gift for specific sporting activities, or a sporting association, is now declared charitable by the 1958 Act.

Suggested Drafting Forms

A gift of realty or personalty might be worded in this way: for the provision of such recreation as shall be conducive to the improvement of the conditions of life of the desired class. It would then be possible to introduce after saving words the desired specific use of the trust property. This may also be a useful form of drafting when a facility is provided which is only questionably in the indirect interests of social welfare. In such an event that class which indirectly benefits should be inserted in the gift in lieu of the immediately benefited class. The immediate class should then be introduced, together with the desired specific use, after the saving words (*m*).

However, there may be occasions when the gift is intended for an allegedly needy class, but there is some uncertainty as to whether that class comes within paragraph (b) (i) (*n*). Moreover, there may also be doubt whether the class is large enough to fulfil the requirement of public benefit. And, since, as Lords Simonds and Somervell said in the *Baddeley* case (*o*), there are different levels of public benefit between the four heads of charity, this doubt may be intensified. It is by no means clear into which of the M'Naghten heads each of the classes enumerated in paragraph (b) (i) is intended to fit, even if each class is exclusively assignable (*p*).

(*l*) Such a notion is contained in s. 1 (2) (b) (i), and it is also to be found in the apparently eligible objects of female activities, but it is otherwise absent from the type of provision of facilities now under consideration.

(*m*) *e.g.*, to A and B [the trust fund] Upon trust to hold the income for the provision of such recreational facilities as shall be conducive to the improvement of the conditions of life of the boys and young men of [the working class or West Ham]. And save in so far as it is excluded by the aforementioned object, and so as not to vary that object, the income shall be applied for the training of adult persons in the work of youth club leadership in [working class areas or West Ham] including the art of boxing.

(*n*) *e.g.*, what are the limits of "social and economic circumstances"?

(*o*) See their judgments generally [1955] A.C. 572, at pp. 583 and 614, respectively.

(*p*) A youth club in Bethnal Green may be poverty; in Bournemouth it may be education.

For these reasons the decision of Upjohn J. in *Re Koettgen's Will Trusts* (*q*) may be of value, and there is no reason why that decision should be restricted in principle to the education cases. "In my judgment," said the learned judge, "it is at the stage when the primary class of eligible persons is ascertained that the question of the public nature of the trust arises and falls to be decided" (*r*). He went on to say that the imperative duty of the trustees to give a preference did not affect the validity of the primary trust, it being quite uncertain whether such persons would exhaust in any one year 75 per cent. of the trust fund (*s*).

By employing this case it would be possible to take the desired class out of the principal terms of the gift, inserting in lieu the public at large. Prior to the saving words and the description of the desired nature of the facility, the desired class could then be introduced by means of a clause conferring a duty upon the trustees to make available not more than a fixed percentage of the trust income in any year for the purpose of giving a preference to the desired class (*t*).

(*q*) [1954] Ch. 252. This was a trust to promote commercial education among British born persons who were financially incapable of educating themselves. But the trustees were required to give preference to the employees of X company and their families, provided that not more than 75 per cent. of the trust income in any one year was expended upon the preferred beneficiaries. Upjohn J. found this to be a charitable trust.

(*r*) *Ibid.*, at p. 258.

(*s*) It has been pointed out that this case opens the way to "serious evasion" of the rule in *Oppenheim* v. *Tobacco Securities Trust Co., Ltd.* [1951] A.C. 297: Atiyah, "Public Benefit in Charities" (1958) 21 M.L.R. 138, at p. 148. But there seems no reason for doubting the correctness of the decision. *Re Koettgen's W.T.* bears a close similarity to the Founders Kin scholarships, and those gifts are charitable despite the fact that the trust income in any one year may be totally expended upon a preferred candidate. There is nothing in Upjohn J.'s language to suggest that preference could not have been extended to 100 per cent. of the trust income, though on the other hand his Lordship's mind was not directed to such an eventuality. If the desired class is of a nature that there will always be candidates to absorb the preferred income, it may be wiser not to make the entire trust income subject to the preference.

(*t*) Examples of drafting forms:

1. To A and B [an estate of realty] to be held Upon trust for such recreational uses as shall be conducive to the improvement of the conditions of life of the public at large, the trustees to be under a duty to give preference in such uses to [the desired class]. And save in so far as it is excluded by the aforementioned object, and so as not to vary that object the trust property shall be employed for the promotion of [the desired activity].
2. To X and Y [a personalty fund] to be held Upon trust for the purpose of applying the income of the trust fund upon such recreational facilities as shall be conducive to the improvement of the conditions of life of the public at large, the trustees to be under a duty to make available not more than seventy-five per cent. of the income in any year for the purpose of giving a preference to [the desired class]. And save in so far as it is excluded by the aforementioned object, and so as not to vary that object the income of the trust fund shall be employed for [the desired facility].

In a few years' time, when the scope of the 1958 Act is better known, it may be possible to omit the employment of saving words. But, in view of the present state of the law of charity in general, *Re Koettgen* offers the donor a most useful method of avoiding the pitfalls of public benefit, upon which requirement the 1958 Act adds nothing.

NOTES OF RECENT CASES

1. *REAL PROPERTY AND CONVEYANCING*

By F. R. Crane, ll.b., Solicitor

Marks v. *Lilley* [1959] 1 W.L.R. 749; [1959] 2 All E.R. 647 (Ch.D.)

Sale of land—time—specific performance—costs.—A contract for the sale of land did not fix a specific date for completion but incorporated the National Conditions of Sale (1953) (16th ed.), whereby in the absence of a named date completion is due on the first working day after the expiration of five weeks from the signing of the contract. The date so calculated was January 7, 1959. The purchaser pressed for prompt completion and when this was not forthcoming issued a writ for specific performance on February 9, 1959. He was given possession on February 16, and completion took place on February 18, 1959. Vaisey J. now held that the purchaser was entitled to the costs of the abortive action, relying on Williams on *Contract of Sale* (1930), at p. 132, where it is stated that a breach of contract is not necessarily a condition precedent to an order for specific performance, though such a breach usually exists. (See, too, Williams on *Vendor and Purchaser*, 4th ed., Vol. 2, at pp. 1001–1002, 1042.) The learned judge said: " . . . as the equitable right had already accrued, notwithstanding the fact that the date for completion had yet to be made certain by the service of the ordinary notice making time of the essence, I think that at the date the writ was issued there was already in existence a right which the plaintiff was in a position, if he had so desired, to enforce by action " ([1959] 1 W.L.R. at p. 753; [1959] 2 All E.R. at pp. 648–649).

The cases defining the circumstances in which time may be of the essence of a contract for the sale of land are not strictly in point, because the effect of notice is usually to bar a party from his right to completion and make rescission available (see, for example, *Stickney* v. *Keeble* [1915] A.C. 386; *Smith* v. *Hamilton* [1951] Ch. 174; *Re Barr's Contract* [1956] 1 W.L.R. 918; [1956] 2 All E.R. 853; *Williams* v. *Greatrex* [1957] 1 W.L.R. 31; [1956] 3 All E.R. 705). The relevant principle here seems to be a fundamental one —that equity will only grant specific performance if, under all the circumstances, it is just and equitable to do so (*Stickney* v. *Keeble* [1915] A.C. at p. 419, *per* Lord Parker of Waddington; *Williams* v. *Greatrex*, *supra*). Vaisey J. here took the view that on the facts the purchaser had acted equitably. Nevertheless the application of the above-mentioned rules concerning time to proceedings for specific performance would not seem to work any obvious hardship, for, as Vaisey J. mentioned, a prospective purchaser can always protect himself against third parties by registering an estate contract.

Armstrong v. *Sheppard and Short, Ltd.*
[1959] 3 W.L.R. 84; [1959] 2 All E.R. 651 (C.A.)

Licence—construction of drain—whether irrevocable by licensor—lack of knowledge of rights—injunction or damages.—A private roadway or pathway ran along the end of the gardens of a row of houses, from the road, to the defendants' premises. The section of the pathway immediately adjacent to the plaintiff's garden had been conveyed to him. At the end of 1957 the defendants constructed a drain under the pathway, from their premises to the public sewer in the road. The plaintiff's permission was obtained (his evidence to the contrary not being accepted) but he was not then aware that he owned a section of the pathway, because his document of title was held by mortgagees. In August 1958 the plaintiff purported to revoke the licence to use the drain, and in this action sought an injunction and damages. The county court judge refused an injunction but gave twenty shillings damages and costs for trespass. The plaintiff appealed, claiming an injunction and larger damages; the defendants cross-appealed contending that the action should have been dismissed. In the Court of Appeal the appeal was heard by Lord Evershed M.R., Willmer L.J. and Cassels J., and the cross-appeal by Lord Evershed M.R., Ormerod and Willmer L.JJ., with the consequence that Lord Evershed gave two judgments, his brethren concurring in each.

On the appeal, the Court of Appeal held, first, that the plaintiff's claim was not debarred by acquiescence since he was not fully aware of his rights when consent was given (citing *Ramsden* v. *Dyson* (1866) L.R. 1 H.L. 129, and *Willmott* v. *Barber* (1880) 15 Ch.D. 96); second, that though the plaintiff had established an infringement of a legal right prima facie entitling him to an injunction (referring to Kerr on *Injunctions* (6th ed.) (1927), at p. 30) the triviality of the matter and the plaintiff's own conduct disentitled him to equitable relief and made the damages given adequate. On the cross-appeal, after references to the cases on executed licences (see articles in (1952) 16 Conv.(N.S.) at pp. 328–330, by F. R. Crane, and (1956) 20 Conv.(N.S.) pp. 281 *et seq.*, by R. H. Maudsley) the court found the permission given justified the construction of the drain, but not the continued passing of effluent down it after the revocation of the licence in August 1958. The defendants could not establish an easement in the absence of a grant, nor any contract with the plaintiff. Here Lord Evershed said a licence irrevocable by the licensor would not be established unless a contract could be proved. It is, however, submitted, with respect, that the earlier authorities (discussed in the articles above referred to) also show that estoppel alone may be enough.

Subject to that point, the decision presents a clear example of a licence which remained revocable because there was neither estoppel nor contract to make it irrevocable by the licensor—in which respects it resembles *Canadian Pacific Ry.* v. *R.* [1931] A.C. 414.

Baines v. *Tweddle* [1959] 3 W.L.R. 29; [1959] 2 All E.R. 724 (C.A.)

Sale of land—contract—attempted rescission by vendor—inability to discharge mortgage — whether conduct reckless — Law Society's Conditions of Sale (1953), *cl.* 10.—A contract for the sale of land normally includes a condition which, broadly speaking, enables the vendor to rescind if the purchaser insists on any requisition or objection which the vendor is unable or unwilling to comply with, without compensation to the purchaser. (See the Law Society's Conditions of Sale, 1953, General Condition 10; National Conditions of Sale, 16th ed., Condition 8.) In form this condition is absolute but the courts have established certain qualifications which prevent a vendor using it to cover up fraudulent or reckless behaviour. Thus, a vendor cannot rely on the condition if he has no title at all (*Re Deighton and Harris' Contract* [1898] 1 Ch. 458), or if he has expressly or impliedly made a representation which he knows to be untrue or does not believe to be true (*Re Jackson and Haden's Contract* [1906] 1 Ch. 412; *Nelthorpe* v. *Holgate* (1844) 1 Coll. 203), or if he makes reckless misrepresentations even though believing them to be true (*Re Jackson and Haden's Contract, supra*; *Merret* v. *Schuster* [1920] 2 Ch. 240.

In the present case the vendor contracted to sell for £580 part of a larger parcel of land which was subject to a first mortgage to a building society for £2,900 and to a second mortgage to A for £600. The contract for sale did not mention the mortgages but of course this was unexceptionable provided the vendor in due course conveyed the relevant plot free from the incumbrances. In fact the vendor, who was some £105 in arrears on his instalment payments under the first mortgage, could not persuade the building society to release the plot to be sold, and apparently never consulted the second mortgagee at all. Shortly before signing the contract the vendor instructed his solicitor to contact the building society, but without telling him of the arrears, when the solicitor said he "thought it would be all right." On signing the contract the vendor mentioned the building society mortgage to the solicitor's clerk, who said his principal "had the matter in hand." The vendor now sought to rescind under General Condition 10 of the Law Society's Conditions of Sale, 1953.

On the above facts the Court of Appeal (Lord Evershed M.R., Romer and Pearce L.JJ.) applied the principles set out above and held that the vendor had been personally reckless to an extent which disentitled him to rely upon the condition. The court held that on the facts known to the vendor he could not have had any real belief that the consent to the sale of the first mortgagees—let alone that of the second—had been obtained. Consequently, the court found it unnecessary to decide whether in such a case the law of principal and agent would make a vendor responsible for any reckless or mistaken advice given by his solicitor. Lord Evershed M.R., on the whole, seemed to think that if erroneous advice had been given (as here it had not) a vendor who relied upon it would not lose his right to rescission. This, it is submitted, would be in accordance with *Re Milner and Organ's Contract* (1920) 89 L.J.Ch. 315 (which

was not referred to) where Eve J. held vendors who acted upon incorrect advice on the construction of an admittedly difficult will could still rescind.

The present decision also, of course, emphasises that the vendor's solicitor should ascertain exactly how his client's title stands before contracts are exchanged, just as the purchaser's solicitor will want to make searches, etc., before his client agrees to buy.

---

2. *TRUSTS*

By F. R. Crane, ll.b., Solicitor

Re Watson's Settlement [1959] 1 W.L.R. 732; [1959] 2 All E.R. 676 (Ch.D.)

Rule against Perpetuities—power of revocation and re-appointment—invalidity of power.—A settlor made, in 1931, a voluntary settlement of a large number of shares in a company, dividing them into blocks or portions to be held on various trusts. Some portions were directed to be held on trust for his children for life, and thereafter as each child might appoint among his or her own children, with trusts in default for such grandchildren at twenty-one or marriage. A further portion (the "campaign shares") was to be held, *inter alia*, on trust to pay the income to the British Empire Cancer Campaign until the discovery of first the cause and second the cure for cancer, such events to be certified by arbiters appointed by the trustees. On each of these events the trustees were to distribute capital to the discoverers, the trusts coming to an end on the discovery of a cure. The settlement also gave the trustees a general power to revoke the trusts of "any of the shares hereby settled" and to appoint others, but not so as to affect any beneficial interest absolutely vested in possession. This power of revocation and reappointment, which had been exercised from time to time, was now challenged as offending the Rule against Perpetuities.

Roxburgh J. held, first, that the word "shares" in the revocation clause meant shares of the company, so that the power could not be severed as regards the different blocks or portions; secondly, that the power was given to all trustees of the settlement and not merely to the original ones; and, thirdly, that the trusts of the campaign shares were valid and charitable.

The decisions on the above points meant the power could be exercised outside the perpetuity period reckoned from the creation of the settlement in 1931, when the lives in being were the settlor, his wife and children, and the original trustees of the settlement. That this was true as regards the campaign shares is obvious, for the discovery of the cause or cure for cancer might be indefinitely postponed (compare *Re Wood* [1894] 2 Ch. 310—trusts to take effect on exhaustion of gravel pits invalid, even though pits actually exhausted in six years at a slower rate of working than that prevalent

during the testator's life). Even the trusts of the children's portions might have unduly prolonged the power of revocation, however, for counsel pointed out that a life interest to a grandchild, not born in 1931, could be validly appointed, whereby vesting in possession of the capital and so the duration of the power, might be postponed beyond a life in being and twenty-one years reckoned from the original settlement. (So far as such an appointment was concerned —if the power had been valid—the Rule would, of course, be satisfied if both life interest and remainder were vested interests; a life interest to one grandchild and capital to another would prevent termination of the trusts under the rule in *Saunders* v. *Vautier* (1841) 4 Beav. 115.)

Consequently, Roxburgh J. held the power of revocation and re-appointment totally void, as being a power exerciseable outside the perpetuity period, following *Re De Sommery* [1912] 2 Ch. 622. The learned judge pointed out that there could be no "wait and see" for this was not the case (more usual in practice) of an invalid appointment under a valid power; he distinguished *Re Bowles* [1905] 1 Ch. 371 and *Re Davies and Kent's Contract* [1910] 2 Ch. 35 as examples of the latter type. In both those cases there were, in effect, alternative limitations dependent on whether or not powers conferred on living persons to appoint to a surviving husband were exercised; as they were not, the valid alternative limitations operated. In neither case could the power be exercised outside the perpetuity period.

Re Pilkington's Will Trusts [1959] 3 W.L.R. 116; [1959] 2 All E.R. 623 (Ch.D.)

Rule against Perpetuities—delegation by trustees—applicability of principles to power of advancement—Trustee Act, 1925, *s.* 32.—This is an important decision, making new law concerning the Rule against Perpetuities.

By his will W. N. P., who died in 1934, settled property on his nephews and nieces then living during their lives, and after their death as each should appoint among his or her children or remoter issue, with trusts in default of appointment. The statutory power of advancement contained in the Trustee Act, 1925, s. 32, was applicable. It was desired to use this statutory power to advance £7,590 to the trustees of a settlement whereby the nominal sum of £10 had been settled on Penelope, a grandniece of the testator born in 1956. The trusts of Penelope's settlement were to apply income for her maintenance, education or benefit till she attained twenty-one and to accumulate the balance, to pay her the income from the age of twenty-one to thirty, and then to hold the capital in trust for her absolutely; if Penelope died under thirty leaving children the property was to be held in trust for such children at twenty-one, and in the meantime on the same trusts for their maintenance, etc., as during Penelope's minority.

It was argued that this proposed exercise of the power of advancement would be void as an infringement both of the principle *delegatus non potest delegare* and of the Rule against Perpetuities. On the first point, it appears to be settled law that in exercising a

special power of appointment the appointor cannot delegate by creating, for example, a discretionary trust, unless the power clearly so provides (*Re Triffit's Settlement* [1958] Ch. 852; *Re Wills' Will Trusts* [1959] Ch. 1, both noted *ante*, Vol. 22 at pp. 299, 300), nor benefit non-objects of the power (*Re Boulton's Settlement Trusts* [1928] Ch. 703), though a power of advancement may always be included in a subsidiary settlement (*Re Mewburn* [1934] Ch. 112; *Re Morris* [1951] 2 All E.R. 528).

On the second point of perpetuity, Penelope was not a life in being at the date of W. N. P.'s death in 1934, and consequently there was no certainty that her absolute interest at thirty, or the alternative gift to her children at twenty-one, would vest within twenty-one years of the death of the survivor of W. N. P.'s nephews and nieces, the relevant lives in being. The desired result could not, therefore, have been wholly achieved by exercise of the special power of appointment created by W. N. P.'s will. (The power to maintain, etc., during Penelope's minority would seem valid as regards perpetuity, as would the determinable interest from twenty-one to thirty years of age vesting in her at twenty-one, at the last possible moment—see Morris and Leach, *The Rule against Perpetuities*, at pp. 90, 91, citing *Wainwright* v. *Miller* [1897] 2 Ch. 255.)

Danckwerts J., however, held the above arguments and authorities irrelevant to an exercise of the statutory power of advancement, and that the proposed trusts of Penelope's settlement could be validly created. He held, first, that under the power of advancement a settlement can be validly made (citing *Re Ropner's Settlement Trusts* [1956] 1 W.L.R. 902; [1956] 3 All E.R. 332n., and *Re Wills, supra*), even on persons who were not beneficiaries under the original settlement (see *Roper-Curzon* v. *Roper-Curzon* (1871) 11 Eq. 452, and contrast *Re Boulton, supra*); and second, that in making such a settlement the trustees were not restricted by the rule against delegation or by the Rule against Perpetuities. Danckwerts J. said " . . . a power of advancement is not the same as a power of appointment. It is plain on principle that, when a power of advancement is exercised, the fund is taken right out of the trust estate and devoted to the benefit of some person who holds it clear of the limiting trusts of the settlement under which the power of advancement is exercised," and contrasted the exercise of a power of appointment, where the appointment is read into and forms part of the original settlement ([1959] 3 W.L.R. at pp. 120, 121; [1959] 2 All E.R. at p. 627). The learned judge distinguished on this basis earlier cases such as *Re Mewburn, supra*, and dissented from a dictum in *Re Wills, supra*, in so far as Upjohn J. there applied the principle *delegatus non potest delegare* to settlements by way of advancement.

So far as the point of delegation is concerned this decision should, it is submitted, be welcomed, for the limitations it imposes on the exercise of powers of appointment do seem arbitrary and inconvenient. Moreover, the Rule against Perpetuities there imposes an effective bar on undue restrictions. But this view must be expressed subject to what is said below.

On the perpetuity point the decision is, with respect, both more controversial and more fundamental. It means that the power of advancement, though limited in the objects to which it may be devoted

(the " benefit " of beneficiaries under the original settlement) is nevertheless to be treated as a general power for purposes of perpetuity. The point does not seem to be taken in the earlier cases or in the books, except by Morris and Leach in *The Rule against Perpetuities,* at p. 142. There the learned authors submit that, unless the transaction can be analysed as an absolute advancement and re-settlement by the beneficiary (*cf. Roper-Curzon* v. *Roper-Curzon, supra*), the perpetuity period should be measured from the creation of the original settlement, because otherwise " capital could be advanced from settlement to settlement in perpetuity without ever coming under the control of an absolute owner, and thus be withdrawn from commerce just as it could if the perpetuity period ran from the exercise, and not from the creation of a special power." The illustration there given of a limitation suggested to be void is on all fours with the instant case.

Whether there should be such a wide avenue of escape from the Rule against Perpetuities is, of course, a matter of opinion. The present writer submits, with respect, that there should not. Moreover, the present situation presents some incongruities. Trustees can do by advancement what they cannot do by exercising a power of appointment vested in them (*cf. Re Churston* [1954] Ch. 383). The Trustee Act, 1925, s. 32, does not apply to settled land or capital moneys under the Settled Land Act, 1925, so trustees of such settlements must rely on express powers of advancement—if they exist.

It may be added that had the decision gone the other way Penelope could have been given the capital at 21, or if her settlement had been executed would have received it at that age by virtue of the Law of Property Act, 1925, s. 163. Only the gift to her children would have been struck out.

Re Turner's Will Trusts [1959] 2 All E.R. 689 (Ch.D.)

Variation of trusts — discretionary trust — meaning of " unborn person "—Variation of Trusts Act, 1958, *s.* 1 (1) (d).—A trust fund was to be held during B's life on protective trusts, thereafter as she should appoint among her children or remoter issue, and for the children in default of appointment. B also had power to appoint a life interest to any husband. B, aged 56, had two children both now over 21 by her first marriage, and had married again, her second husband being a party to the application. The proposal was that B should release her two powers of appointment and that the capital of the trust fund should be divided between her and the children on an actuarial basis, the children settling their shares.

The Variation of Trusts Act, 1958, s. 1, allows the court to give approval to variation of trusts on behalf of (*inter alia*) : " any person (ascertained or not) "—sub-para. (b); " any person unborn "—sub-para. (c); and " any person in respect of any discretionary interest . . ."—sub-para. (d). Danckwerts J. now held that the words " any person " in sub-para. (d) included persons unborn or unascertained, despite the antithesis between the wording of the three sub-paragraphs. He found assistance in the Trustee Act, 1925, s. 33 (i) (ii), where the word " persons " clearly contemplates unborn or unascertained persons being interested under discretionary trusts. Danckwerts J. went on

to hold that in any event the unborn grandchildren of B would benefit directly under the arrangement, so that sub-para. (d) did not have to be relied upon.

The construction here placed on sub-paragraph (d) is to be welcomed, for a contrary conclusion would in most cases have restored the discretionary trust to its pre-Act position of a bar to variation.

---

3. *WILLS*

By A. Kiralfy, Barrister-at-Law

Re Royce's Will Trusts; Tildesley v. *Tildesley* [1959] 3 W.L.R. 254

Attesting witness—legacy—relevant time—Wills Act, 1837, *s.* 15. —The Court of Appeal have restored consistency to this part of the law by applying the mischief rule and the historical method, rather than the literal and technical rule applied by Wynn-Parry J. It is clear that section 15 represents a development from the provisions of the Statute of Frauds. If a transaction is completely free from fraud its validity cannot be affected by later events. Lord Evershed and Romer L.J. emphasise that genuineness of execution and absence of duress or undue influence must be judged at the moment of execution. Hence if an attesting witness receives no benefit under the will as executed it is irrelevant that, as a result of the act of some other person, he later acquires a benefit. The resulting benefit is therefore not forfeited. This had already been held where a witness married a legatee after execution of the will (*Thorpe* v. *Bestwick* (1881) 6 Q.B.D. 311). In the instant case a witness was appointed solicitor-trustee by the survivor of the original trustees and was held entitled to the benefits conferred on trustees by the will. The Act refers to benefits conferred on witnesses *by* the will, and not merely as a result of it, and no benefits were conferred on the claimant anywhere in the will. The subsequent appointment as trustee was a *novus actus interveniens.*

(Theobald 116)

S.C. *Legacies—Cumulative or substitutional.*—One clause in a will gave the trustees of the will 5 per cent. of the income of the trust as remuneration for their services. Another clause allowed the solicitor-trustee to charge profit costs. It was clear that these two legacies were cumulative. The amounts varied—one being based on a percentage of the income and the other on the amount of work done. The nature of the services of a solicitor in legal work and of a trustee in management and policy matters obviously differ.

(Theobald 153)

Re Douglas's Will Trusts [1959] 1 W.L.R. 744; [1959] 2 All E.R. 620

Will—construction—partial intestacy; will—"securities." — The rule in *Cripps* v. *Wolcott* (1819) 4 Madd. 11 provides that, where a gift is made to X for life and a gift over is made to the survivors of Y and Z, the survivorship referred to is the surviving X and not merely the testator. In the instant case this construction was fortified by what appear to be clear words. Income was left to a wife for life, and then, after her death, the property was to go to named sisters and the survivors of them. None of these survived the wife. It was unsuccessfully argued that the court might treat the will as leaving the property to the sisters subject to the widow's life interest; there were no indications of any such intention. In the result the widow took the personal chattels and other interests under the law of intestacy.

(Theobald 576)

S.C. Vaisey J. held that a power to invest in "securities" meant a power to invest in any investments authorised by law or by the trust instrument, and was not limited to investments secured by mortgages or other additional security.

Re Wragg [1959] 2 All E.R. 717

Will—construction—partial intestacy. — The law draws a clear distinction between a gift of a fixed annuity or periodic income and a gift of the income, or a fraction of the income, of the whole or part of the estate, but this distinction may be blurred if there is a gift of a minimum annuity to be raised out of income with resort for any annual deficiency to capital. In the instant case the testator made his will in 1949 and died in 1957. In the interim period the nominal value of his estate increased, probably as much through inflation as any other cause. He had left his widow a fixed annuity of £3 10s. 0d. per week. In 1949 he was in some doubt whether his residuary estate would produce that much, and authorised the trustees to resort to capital to make up any deficiency. In fact there was a small surplus of income over the annuity and no provision had been made for this eventuality. The Court of Appeal held that the widow was entitled to this surplus as intestate successor.

The estate was to go on the widow's death to certain named persons in equal shares, but the court could find no reason for accelerating this provision. *Re Gillett* [1950] Ch. 102 was cited as an analogy, though that case is not precisely in point. A gift "after" a death cannot, on general principles, carry income before the death, as otherwise you are contradicting the will. The court pointed out that the leaning against intestacy is inapplicable where there is no real ambiguity. It might be added that, at a time when Parliament is constantly revising the intestacy laws and trying to make them more progressive, there seems little point in leaning against intestacy. The suggestion that people who make a will do not mean to die intestate is reasonable, but is only a surmise, unless the will makes some reference

to the point. By something of a fiction the intentions of the draftsman are imputed to the testator and one cannot say the draftsman intended the opposite of what he has done, especially as ignorance of the law is irrelevant.

The case contains a curious observation on precedent in construction cases, which the practitioner might well note. Lord Evershed points out that no two wills are identical, which gives the judges a little freedom in refusing to follow each other, but also that the Court of Appeal may have to be stricter than a judge of first instance. There appears to be a slight contradiction here. True, the appeal court's decisions are binding on the judges, but cannot they be distinguished on precisely the same ground, that no two wills are the same? Possibly the fact that the decisions of the Court of Appeal will generally be reported and studied means that they must be kept more closely within the rules of law. In this part of the law one senses that judges do take some liberties in the interests of justice. However, it would be unfortunate if litigants were to get the impression that they should appeal more often, and not be able to treat the decision at first instance as strictly based on law.

(Theobald 622, 680)

---

4. *LANDLORD AND TENANT CASES*

By D. Macintyre, m.a., Barrister-at-Law

White v. *Elmdene Estates, Ltd.* [1959] 3 W.L.R. 185; [1959] 2 All E.R. 605 (C.A.)

Rent Acts—premium—sale of house to third party as condition of grant of tenancy—sale at undervalue—whether amount of undervalue a premium—whether recoverable from landlord.—The Court of Appeal held in this case that a landlord, who requires as a condition of the grant of a tenancy of rent-controlled premises that the tenant shall sell his old house to a third party at an undervalue, has required the payment of a premium within the meaning of section 2 (1) of the Landlord and Tenant (Rent Control) Act, 1949. They held also that a premium of this nature is recoverable from the landlord under section 2 (6) of the Act, even though the landlord receives no direct benefit from the sale. A "premium," it will be remembered, includes for the purposes of this Act " any fine or other like sum and any other pecuniary consideration in addition to rent " (s. 18 (2)).

The court rejected a contention by counsel for the landlord company that no offence could have been committed under section 2 (1) of the Act, since there had been neither a " premium " nor a " payment " within the meaning of that section. Lord Evershed M.R., after reviewing the statutory history of the section from the original Act of 1915 onwards, concluded that " where a specific sum is to be deducted from a known or assumed sale price as a condition of the grant of a tenancy, that is a ' pecuniary consideration ' within the scope of

the definition and amounts, therefore, to a premium." Ormerod and Willmer L.JJ., who both agreed, observed that pecuniary consideration had clearly moved from the tenant according to the law of contract. "Pecuniary consideration" means in this context any pecuniary consideration other than fines or premiums and need not be construed *ejusdem generis*. On the meaning of the expression "payment" the court also rejected a dictum of Lord Goddard C.J. in *R.* v. *Birmingham Rent Tribunal, ex p. Edgbaston Investment Trust, Ltd.* [1951] 2 K.B. 54, which, if read literally, suggests that "payment" in section 2 (1) of the Act is confined to payments to the landlord. That section, in the view of the court, prohibits not only payments to the landlord, but also payments to the landlord's order.

On the second point the court held unanimously that since a premium had been required and paid, that premium was recoverable from the landlord company, who required it, even though it had in fact been paid to another company, which, though controlled by the same family, was quite distinct from the landlord company. But they expressly left open the question whether the third party, if sued for the return of the premium, would have been liable to repay it.

It was also held that, since the defendants had raised no objection, the plaintiff could sue as sole plaintiff for the return of the whole premium, even though he and his wife had paid it jointly.

Leave to appeal to the House of Lords was granted.

John Miller (Shipping), Ltd. v. *Port of London Authority*
[1959] 1 W.L.R. 910; [1959] 2 All E.R. 713 (Ch.D.)

Landlord and Tenant Act, 1954—*business premises—application for new tenancy—intention of landlords to occupy holding—evidence of intention—offer of undertaking by landlords—application for discovery.*—The landlords in this case opposed an application for a new tenancy of business premises on the ground set out in section 30 (1) (*g*) of the Landlord and Tenant Act, 1954, namely, that the landlords intended to occupy the holding for the purposes of their own business. Their estates officer stated in an affidavit that he had authority to offer an undertaking to that effect. But the tenants still sought an order for discovery of documents with a view to disputing the fixity of the landlords' intention. Roxburgh J., upon a procedure summons, held, first, that no order for discovery will be made in the course of proceedings by summons unless special circumstances are shown (see *Re Borthwick* [1948] Ch. 645), and, secondly (applying *Espresso Coffee Machine Co., Ltd.* v. *Guardian Assurance Co., Ltd.* [1959] 1 W.L.R. 250 (noted at p. 229, *ante*)), that in any event the special circumstances of this case were entirely against the making of an order, since there could be no better evidence of a fixed and settled intention than the landlords' offer.

The learned judge agreed, however, that he ought not to accept the offer upon an interlocutory application. But this, he held, did not affect his view of this application, since, even if the court did allow the landlords to resile from their offer at a later stage, it would not allow the tenants to be prejudiced thereby, and the question

whether the tenants should be allowed discovery could in those new circumstances be raised again.

---

5. *REVENUE CASES*

By David R. Stanford, m.a., ll.b., Barrister-at-Law

(*Note*:—Where a case is not reported in any of the general series of law reports it is cited from *Taxation Reports* (T.R.).)

C. I. R. v. *Hinchy* [1959] 3 W.L.R. 66; [1959] 2 All E.R. 512; [1959] T.R. 171 (C.A.)

Income Tax—Incorrect return—Penalty

Statutory provision: Income Tax Act, 1952, s. 25 (3).

Point: By the Income Tax Act, 1952, s. 25 (3), "A person who neglects or refuses to deliver, within the time limited in any notice served on him, or wilfully makes delay in delivering, a true and correct list, declaration, statement, or return which he is required under the preceding provisions of this Chapter to deliver shall—(a) if proceeded against by action in any court, forfeit the sum of £20 and treble the tax which he ought to be charged under this Act . . .". This provision, which has been part of the taxing legislation for over a hundred years, has always been interpreted by the Revenue to mean that the defaulting taxpayer could be charged with treble the amount of his total tax liability for the relevant period. However, the Court of Appeal have now held that "the tax which he ought to be charged" in this section means the tax which the taxpayer ought to be charged and was not charged because of his failure to make a true and correct statement of his income. If, of course, there has been a failure to make any return at all, then the phrase will cover the total of the tax liability for the relevant period.

In the present case the taxpayer's default lay in an understatement of one of his sources of income and thus "the tax which he ought to be charged" meant the tax which he ought to be, but was not by reason of his default, charged on the undisclosed income. In so holding, the Court of Appeal upheld the decision of Diplock J. (see *ante*, Vol. 23, pp. 68 and 69) as to the interpretation of the quoted words, but differed from the learned judge in the date at which the test was to be applied. The learned judge had held that the relevant date was at the issue of the writ and at that date no tax remained outstanding as an assessment had already been made in respect of the whole of the income. The Court of Appeal, however, held that the relevant time was when the offence was committed, namely, when the false return was received by the General Commissioners, or, in a case where no return was made, when the time for making the return expired. At that time there was an outstanding amount to be charged to tax as no assessment in respect of the undisclosed income was made.

Leave to appeal to the House of Lords was granted upon the Revenue undertaking to pay all costs of such appeal.

Re Westminster's Deed of Appointment [1959] 1 Ch. 265; [1959] 2 W.L.R. 299; (1959) 38 A.T.C. 48; [1959] T.R. 49 (C.A.)

Income Tax—Free of tax payments—Provision made

Statutory provision: Income Tax Act, 1952, s. 486.

Point: The Income Tax Act, 1952, s. 486, originally enacted in 1941, is an enactment designed to prevent hardship accruing to persons liable to make annual payments free of tax where such payments were arranged at a date when the high rates of tax which came about during the war were not contemplated. Thus, a provision by deed or will made before September 3, 1939, which has not been varied since that date for the payment of an amount free of income tax, is reduced by the relation between the standard rate at the outbreak of war and that of the date of payment. For the reduction to take place, the provision must have been "made" before September 3, 1939. A provision is made even though payment is not presently due and hence, where on September 3, 1939, under a deed previously executed, there was a contingent legal right to a future annuity, provision had then been made for the payment of that annuity.

Facts and Decision: In 1930 the husband in consideration of his marriage appointed to his intended wife a rentcharge of £6,000 to commence from his death out of certain settled property. He further entered into a covenant with the intended wife that his executors and administrators would pay to her during her life such yearly sum as with the above-mentioned rentcharge would, after deduction of all income tax and surtax, leave the net yearly sum of £6,000. The payment under the covenant was subject to two conditions, namely (a) that the intended marriage should be solemnised, and (b) that the wife survived him. The marriage duly took place in 1930 and the husband died in 1953 from which time the covenanted sum became payable. The wife claimed that provision of the covenanted sum was not made before September 3, 1939, for at that date nothing was payable and she was only entitled to the annuity on the contingency that she survived her husband.

Held: that the relevant provision was "made" for the purpose of section 486 on the date that the covenant was executed. The Court of Appeal distinguished *Berkeley* v. *Berkeley* [1946] A.C. 555, in which case it was determined that a provision made by will was only made at the death and not at the date that the will was executed. In the case of the will, the provision was revocable until death. The will of a living testator confers no right on anyone to any benefit. On the other hand, the right under which the wife took her annuity was one created on the execution of the covenant in 1930, although nothing became payable until 1953. The relevant date for the purposes of section 486 was the date when the contingent right to receive the

annuity was conferred and not the date when it became presently payable.

Leave to appeal to the House of Lords was granted.

I. R. C. v. *Hudspeth* [1959] 2 All E.R. 752 (Ch.D.)

Dividend after Surtax Direction

Statutory provisions: Income Tax Act, 1952, s. 249 (5).

Point: Where a surtax direction is made under the Income Tax Act, 1952, s. 245, by the Special Commissioners in respect of any year, the actual income of the year from all sources for that year is deemed to be the income of the members and it is apportioned amongst the members. Consequent upon the apportionment, surtax is assessed and charged on each member in the name of the company on the appropriate portion of the actual income of the company. Liability for payment of the surtax is a joint one of the company and the member and the amount of such surtax is normally satisfied by the company. It may happen that subsequently the company makes an actual distribution of the income in respect of which surtax has been charged pursuant to the direction. In such case, no further surtax is charged on the recipient of the actual income. To be franked by the surtax paid pursuant to the direction, the subsequent actual dividend must, however, be shown to have been out of the actual income notionally distributed pursuant to the surtax direction.

Facts and Decision: Pursuant to a direction by the Special Commissioners, the actual income of a company for the years ending March 31, 1951 and 1952, was apportioned between the members and surtax exacted accordingly. The actual income for the two years concerned was £16,824 and £15,906 respectively. In 1956 the company declared a dividend, the net amount of which was equivalent to the actual income for 1951 and 1952 stated above, less tax at the standard rate. The commercial profits actually made by the company in the years 1951 and 1952 as distinct from the actual income computed for the purposes of a surtax direction, were insufficient to cover the whole of the dividend declared. In consequence, the whole of the dividend could not be attributed to the years 1951 and 1952.

Held: that only such part of the dividend as was paid out for commercial profits of the years 1951 and 1952 was franked for surtax purposes under section 249 (5) of the Income Tax Act, 1952. The part of the dividend which had to be treated as paid out of years other than 1951 and 1952 thus still formed part of the shareholders' income for tax purposes. The object of section 249 (5) is to ensure that a taxpayer should not have to pay surtax twice in respect of the same sum of money and therefore in order to claim relief it must be shown that precisely the same sum of money is involved in each case.

Barclays Bank, Ltd. v. *C. I. R.* [1959] 3 W.L.R. 240; 103 S.J. 676; [1959] 3 All E.R. 140 (C.A.)

Estate Duty—Assets Valuation—Control

Statutory provisions: Finance Act, 1894, s. 7 (5); Finance Act, 1940, ss. 55–58.

Point: Under the Finance Act, 1940, s. 55 (1), an assets valuation is applicable to shares and debentures passing on the death of a deceased irrespective of the destination of such shares or debentures if "the deceased had the control of the company at any time during the five years ending with his death." By subsection (3) of section 55, for the purposes of that section a person is deemed "to have had control of a company at any time if he then had—(a) the control of powers of voting on all questions, or on any particular question, affecting the company as a whole which if exercised would have yielded a majority of the votes capable of being exercised thereon . . . or if he could have obtained such control or capacity by an exercise at that time of a power exercisable by him or with his consent."

In the present case the deceased held beneficially a minority of shares in the company but such holding when aggregated with his holding as a trustee of a settlement made by himself amounted to an interest greater than 51 per cent. of the issued voting share capital of the company. The deceased was the first-named trustee and thus by clause 61 of the 1908 Table A incorporated in the company's articles of association he had the prior right to use the votes of the trust shares at a company meeting.

In these circumstances Danckwerts J. held (see Vol. 23, pp. 70, 71) that the deceased did not control the company as the trust votes could not be counted. Although the protection given to a person holding in a fiduciary capacity under section 55 (5) was not available as the fiduciary capacity was self-imposed (see s. 58 (5)) the deceased could only use the trust votes according to the will of all four trustees. The Court of Appeal has now reversed the decision of the learned judge, holding that the ability to exercise the votes was sufficient even though such exercise needed to be at the unanimous direction of the body of the trustees.

Subject to exclusion by virtue of a fiduciary capacity under section 55 (5) a person has control who was during the relevant period in a position by virtue of the voting rights vested in him to secure the passing of an ordinary resolution at a general meeting. The fact that other persons may have some control over the way in which the person having the right to vote exercises such right may cause those other persons also to be in control of the company but does not affect the control of the person with the right to vote. Control is to be judged by the company's constitution (compare the question of central management and control for residence purposes: *Bullock* v. *Unit Construction Co., Ltd.* [1959] 2 W.L.R. 437).

Whilst unanimous in its verdict the Court of Appeal differed in their interpretation of the relationship between subsections (1) and (3) of section 55. Lord Evershed M.R., with whose judgment Pearce L.J. agreed, held that subsection (3) was merely a definition or

exposition of sub-clause (1), whereas Romer L.J. was of opinion that subsection (3) was supplemental to or expansive of subsection (1).

The result affirmed what was generally thought to be the position prior to the decision at first instance. In other words, the votes of the first-named trustee if he be the settlor will be counted towards control for assets valuation purposes. The votes of trustees other than the first-named trustee will not be so counted. However, in view of the fact that control in order to bring about an assets valuation need only exist for one moment of time during the five years preceding the death care should be exercised in the retention of a position as trustee by a settlor. If by reason of death or retirement of trustees the settlor should be a trustee even for a short time an assets valuation might thereby be caused. It is immaterial for assessing control to consider whether or not the controlling power has in fact been exercised.

Leave was granted to appeal to the House of Lords.

---

6. *PLANNING CASES*

By V. G. Wellings, M.A. (Oxon), Barrister-at-Law

Stephens v. *Cuckfield Rural District Council* [1959] 1 Q.B. 516; [1959] 2 W.L.R. 480; [1959] 1 All E.R. 635 (Q.B.D.)

Section 33 notice—injury to amenity—"garden, vacant site or other open land."—Section 33 of the Act of 1947 must be limited to a case where the garden, vacant site or other open land is not within the curtilage of a building. Lord Parker C.J. granted a declaration to this effect but was prepared to allow for a possible exception in a case where the garden, vacant site or other open land has not, as it were, acquired the user of that building. Land had been used from 1939 to 1955 as a sawmill and sawmill yard, and for this purpose buildings had been erected on the land. In 1955 use as a sawmill was discontinued and the owner then let the land to a company for the purpose of breaking up vehicles and adapting the parts for sale. The company's use of the land and buildings was permitted under the Use Classes Order, 1950, because use as a sawmill is a general industrial use. A notice under section 33 was served on the owner requiring the removal of all cars, car bodies and machinery from the "open land within the curtilage of the premises." Lord Parker C.J. held that the notice was a nullity and expressed the view that section 33 covers any operations or user of any open land in the sense of any land which is not built on. He added that it may be that the curtilage was not the right test but that the test might be whether, as in the Use Classes Order, the land is occupied with and used for the same purposes as the building; but so far as the present case was concerned there was no difficulty because the notice itself was specifically dealing with the condition of open land within the curtilage of the premises.

Cater v. *Essex County Council* [1959] 2 W.L.R. 739; [1959] 2 All E.R. 213 (D.C.)

The owner of land made a material change in its use by beginning to use it as a caravan site. An enforcement notice was served upon him alleging the carrying out of "development consisting of a material change of use . . . without the grant of permission required in that behalf under Part III of the Town and Country Planning Act, 1947, the said land being used for the purpose of a caravan site." It was held that in a case where the Town and Country Planning Development Order, 1950, applied by the First Schedule, Class IV, 2, to permit "the use of land . . . for any purpose on not more than 28 days in total in any calendar year" there had been a grant of permission required in that behalf under Part III of the Act; accordingly the recital in the notice was untrue in fact and the notice was a nullity. This decision follows logically from the decision of the Court of Appeal in *Francis* v. *Yiewsley and West Drayton U. D. C.* [1958] 1 Q.B. 478; [1957] 3 All E.R. 529; (1958) 22 *Conveyancer* 75: see the article "Freedom to Change the Use of Land—or the Caravan-Dwellers' Charter" in [1958] J.P.L. 154 *et seq.* The question raised in that article whether it is a condition of the permission granted by the 1950 Order that the permitted use be discontinued after the 28th day has now, with reference to future cases of this kind, been answered in the affirmative by the Lords amendments to the Town and Country Planning Bill, which has now passed into law.

THE LIBRARY

Wills, Probate and Administration. By B. S. Ker, Solicitor. Sweet & Maxwell, Ltd. 278 pp. (£2 2s.)

Mr. Ker has produced a useful compendium of the law for the practitioner, in a handy size. Obviously many *minutiae* have had to be omitted, but the text should prove adequate for most purposes in practice. The arrangement of the book is thoughtful and follows a natural chronological order. Its style is clear and attractive, and the text is broken down into manageable sections and subsections. Cases and statutes are adequately dealt with. There are useful practical hints and memory-ticklers. The only caution to be observed by the reader is the inevitable omission of the precise dividing lines between rules, *e.g.*, the account of specific legacies is too brief (pp. 115–116); the impression may be created (pp. 112 and 129) that personal property does not bear its own charges; and the possible complications ensuing on the discovery of a later will, not uncommon in practice, are hardly touched on. The book is well up to date and especially detailed on revenue problems and on the difficult and conflicting cases on the Schedules to the Administration of Estates Act.

A. K.